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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 305

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER,

vs.

BENNETT F. SCHAUFFLER, INDIVIDUALLY AND AS REGIONAL DIRECTOR FOR THE 5TH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 11, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

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[fol. 1] [Caption omitted.]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

In Equity. No. 401

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Complainant,

against

BENNET F. SCHAUFFLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; Jacob Blum, Individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; and The Trial Examiner [fol. 2] of the National Labor Relations Board Designated or to be Designated by the National Labor Relations Board, Who is Now Unknown, Individually and as such Trial Examiner and as the National Labor Relations Board, Defendants

BILL OF COMPLAINT—Filed July 14, 1937

To the Honorable Judges of the District Court for the Eastern District of Virginia:

The complainant, Newport News Shipbuilding and Dry Dock Company, brings this, its bill of complaint, for a restraining order and injunction and its petition for a declaratory judgment against the parties defendant named herein and respectfully shows to this Honorable Court:

(1) The complainant, Newport News Shipbuilding and Dry Dock Company, is a corporation created and existing under the laws of the Commonwealth of Virginia and is a citizen of the United States and of the Commonwealth of Virginia.

Complainant is now and has been for many years engaged in the operation of a certain complete and integrated shipyard designed and used for the building of naval and merchant vessels, consisting of a single plant located on the banks of the James River, in Newport News, Virginia, (hereinafter sometimes referred to as the "Shipyard") and which is more particularly described in Article 6 hereof.

(2) Purporting to act under the supposed authority of an Act of Congress styled Public No. 198, 74th Congress, approved by the President July 5, 1935, (U. S. Code Title 29, Sec. 151-166), known as the "National Labor Relations Act" (hereinafter sometimes referred to as the "Act") J. Warren Madden as chairman and member and Edwin S. Smith as member of said Board, appointed by the President thereto and confirmed in their appointment by the Senate on August 24, 1935, and one Donald Wakefield Smith appointed by the President thereto on September 23, 1936 and [fol. 3] being confirmed by the Senate and they and each of them having duly qualified as your complainant is advised (sometimes hereinafter referred to as such National Labor Relations Board), delivered or caused to be delivered to the complainant on June 21, 1937 at its shipyard at Newport News, Virginia, a certain paper consisting of two parts, and entitled "Complaint" and "Notice of Hearing" and another paper entitled "Charge", together with a copy of "Rules and Regulations, Series 1" of the National Labor Relations Board as amended April 27, 1936. A copy of each said paper and a copy of said Rules and Regulations are attached hereto marked Exhibits "A" and "B" respectively, and are made a part hereof. The aforesaid Complaint and Notice of Hearing are dated June 18, 1937 and are signed by the defendant, Bennet F. Schauffler, as Regional Director of the National Labor Relations Board and said Charge is dated June 4, 1937 and is signed by Philip H. Van Gelder, Secretary-Treasurer, Industrial Union of Marine and Shipbuilding Workers of America, 2332 Broadway, Camden, N. J. In signing said Complaint and Notice of Hearing, said defendant, Bennet F. Schauffler, as stated therein, was acting as agent of the National Labor Relations Board, and was acting as such Board. Said Complaint and said Notice of Hearing are the Complaint and Notice of Hearing of said National Labor Relations Board.

By said Notice of Hearing complainant was notified that a hearing would take place on July 8, 1937, at 10 o'clock, in the forenoon, in the Corporation Court, Municipal Building, Newport News, Virginia, before the National Labor Relations Board for the purpose of determining whether or not complainant has engaged and is engaging in the so-called unfair labor practices alleged in said complaint.

Said Madden is a citizen of the State of Pennsylvania; said Edwin S. Smith is a citizen of the Commonwealth of

Massachusetts; and said Donald Wakefield Smith is a citizen of the State of Pennsylvania. Said Madden, Smith and Smith would appear to be proper parties defendant herein but are not necessary parties defendant and are not named parties defendant because they are not, as complainant is [fol. 4] advised, personally within the jurisdiction of this Honorable Court. Although they have not been named as parties defendant herein for the foregoing reasons the complainant desires to have them granted the right to become parties defendant herein with all of the rights of parties defendant and that they be not limited to an appearance before this Court as amici curiae, or in any other capacity with rights inferior to those of actual parties defendant.

(3) The complainant is informed and believes and therefore alleges that the defendant, Bennet F. Schauffler is a citizen of the State of Maryland, residing in Baltimore in said State, and has been appointed and is now acting as Regional Director of the 5th Region, National Labor Relations Board, having been designated as such by said Board, and is charged with the duty of prosecuting enquiries and investigations under the Act and doing other things as provided by Article IV of the Rules and Regulations of said Board hereinafter more specifically referred to and is now acting as said National Labor Relations Board in the Commonwealth of Virginia, among other places, under the title of "Regional Director of the 5th Region, National Labor Relations Board", and is sued herein individually and as such Regional Director and as such Board.

(4) The complainant is informed and believes and therefore alleges that the defendant, Jacob Blum, is a citizen of the United States and of the State of Maryland, residing in the City of Baltimore, in said State, and has been appointed and is now acting as Regional Attorney for the said 5th Region, National Labor Relations Board, having been designated as such by said Board, and is charged with the duty of prosecuting enquiries and investigations under said Act and doing other things as provided by Article IV of the aforesaid Rules and Regulations of said Board, and is now acting as said Board in the Commonwealth of Virginia, among other places, under the title of "Regional Attorney, 5th Region, National Labor Relations Board" and is sued

herein individually and as such Regional Attorney and as such Board.

(5) The complainant is not informed of the name or ad- [fol. 5] dress of the defendant trial examiner who will act as Trial Examiner of the National Labor Relations Board in the proceedings to begin with the aforesaid hearing scheduled to be held on July 8, 1937, and hereinafter more specifically referred to. Said trial examiner has been or will be designated as such trial examiner by the said National Labor Relations Board, to preside at said hearing and is or will be charged with the duty of prosecuting enquiries and investigations under the Act in respect thereof and of doing such other things as provided by Article IV of the aforesaid Rules and Regulations of said Board and is now or will be acting as the National Labor Relations Board in the Commonwealth of Virginia, among other places, under the title of "Trial Examiner" and is sued herein individually and as such Trial Examiner and as such Board.

(6) The complainant's aforesaid shipyard, designed and used for the building of naval and merchant vessels as aforesaid, located at Newport News, Virginia, is a complete and integrated shipyard containing numerous buildings, shops, 8 shipways, three (3) dry docks, fixtures and equipment necessary to the conduct of complainant's business; seven (7) piers at which ships are completed after the launching thereof, a pattern shop, a mould loft, a riggers loft, machine shops, a boiler shop, a sheet metal shop, a blacksmith shop, plate shops, a copper shop, a carpenter and joiner shop, a paint shop, a foundry for making iron, brass and steel castings, power houses, numerous warehouses and storerooms, plate and shape storage yards, pickling and wash tanks, a galvanizing plant, a welding plant, assembly and storage areas, a lumber yard and dry kilns, a scrap yard, a material testing plant, an emergency hospital or clinic, an apprentice school building, a main office building, a superintendent's office building, drafting rooms and miscellaneous equipment and accessories.

Said plant is equipped with the necessary machine tools, pipe benders, punches, shears, rolls steam hammers, keel benders, electric and spot welding equipment, shop, pier, storeroom and yard cranes, complete wood-working equipment, complete sheet metal fabricating equipment, complete

[fol. 6] equipment for building boilers, and other machinery and accessories necessary to the operation of such integrated shipbuilding plant or shipyard and the conduct at Newport News of complainant's business of building and repairing vessels and performing certain other processing operations.

(7) The complainant engages in the business of designing and building vessels of various kinds, sizes and descriptions but only under specific contracts with those for whom such vessels are being or are to be built, except that to the extent of approximately 3% of its total business it at times has built on specific orders certain machine products, such as water turbines.

At the present time, your complainant employs in its business approximately 7,500 employees, each of whom is engaged in connection with its said business described as aforesaid.

(8) In the designing and building of vessels, which always has constituted and still constitutes for the most part complainant's business, and in performing such repairs on such completed vessels as may come to complainant's shipyard for such repairs, it is necessary for the complainant to and the complainant does fabricate and shape in its shipyard especially for each vessel built or repaired there practically all of the materials used by it in building or repairing such vessels, and the complainant builds for the most part the machinery for each such vessel so built by it. When completed, vessels so built for the United States Navy are delivered to the Navy Department at Norfolk, Virginia, and all other vessels so built or repaired are delivered at its plant in Newport News by the complainant to those for whom they are built or repaired.

The cost of materials used in building said vessels represents less than one-half of the cost to the complainant of doing such work and the cost of materials used in repairing vessels represents only a small fraction of the cost to complainant of performing such repairs.

The vessels built or repaired and other work done by complainant at said shipyard bear and will bear no resemblance [fol. 7] to the materials from which they are or will be built. Such vessels and other things, when finished, are and will be of far greater value than the materials which are and will be used in building and constructing them.

The substantial increase in value is and will be due to the designing, fabricating and building operations performed by the complainant at its said shipyard.

Of the total business done by complainant in 1936 approximately 91.4% thereof was shipbuilding, which consisted solely of Naval shipbuilding; 5.8% was repair work, and 2.8% was hydraulic turbine construction. Complainant has had no merchant shipbuilding work between June, 1934 and January, 1937.

(9) Section 7 of the Act provides that:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." U. S. C. A., Title 29, Sec. 157.

By Section 8 of the Act it is made "an unfair labor practice for an employer"—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. U. S. C. A., Title 29, Sec. 158.

(10) As heretofore set out in Article 2 of this bill of complaint, said hearing scheduled to be held July 8, 1937 is called for the purpose of determining whether or not complainant has engaged and is engaging in the so-called unfair labor practices alleged in said complaint.

[fol. 8] (11) Complainant is advised, believes and therefore alleges that no hearing has been held and no evidence whatsoever has been adduced at any hearing by or before the National Labor Relations Board or any agent or agency thereof as a basis for any of the allegations made by such Board in said complaint. If the National Labor Relations Board, after said hearing and proceedings to be had on

said complaint, shall continue to maintain that the complainant has engaged in said alleged so-called unfair labor practices, or either of them, said Board will proceed to issue and cause to be served on the complainant pursuant to the provisions of Section 10(c) of the Act an order requiring the complainant to cease and desist from such practices and to take such other affirmative action as may be prescribed by said Board.

The hearing proposed to be had by said board was not proposed or the proceedings therefor commenced by your complainant's employees, or by any labor organization with which any appreciable number of its employees are affiliated, and no harm can come from staying said hearing and proceedings thereon until this Honorable Court may finally determine whether or not the National Labor Relations Board, its officers, agents and/or agencies are unlawfully trespassing upon the rights of your complainant.

(12) Complainant has not, as charged by said National Labor Relations Board (Exhibit "A"), engaged in unfair labor practices affecting commerce and specifically,

Does not cause and has not "continuously caused a considerable portion of the products manufactured by it, and of the ships overhauled or repaired by it, to be transported in interstate commerce from its plant in Virginia, into and through states of the United States other than the State of Virginia, and in commerce with foreign countries", as alleged in paragraph 2 of Exhibit "A" or otherwise.

Did not discharge and has not refused to reinstate the persons named in paragraph 4 of Exhibit "A" or either of them for that they, or either of them, joined and as-
[fol. 9] sisted the Industrial Union of Marine and Shipbuilding Workers of America, and engaged in concerted activities with other employees in said shipyard for the purpose of collective bargaining and other mutual aid and protection as and for the reasons alleged in paragraph 5 of Exhibit "A" and complainant denies that said persons or either of them are employees of complainant. On the contrary, complainant alleges that it did not know that any of said persons were members of said Industrial Union until after said employment had ceased on or about the respective dates so alleged in the complaint. See Exhibit "C".

Denies that by the discharge of and refusal to reinstate the persons named in paragraph 4 of Exhibit "A" the complainant discriminated and is discriminating in regard to the hire and tenure of employment of said individuals or any of them and denies that it did thereby discourage and is discouraging membership in said Union and denies that it did thereby engage in and is engaging in unfair labor practices within the meaning of said Act. On the contrary, complainant alleges that none of said persons have expressed to it, its officers or agents dissatisfaction regarding said action and none of them have to this day sought or requested to be reinstated. See Exhibit "C".

Denies that the complainant by its officers and agents during the year 1927 did cause to be put in force and effect at its shipyard the plan known as "Representation of Employees" as alleged in paragraph 7 of Exhibit "A" and complainant alleges that said plan was put into effect in 1927 by complainant by and with the consent and approval and cooperation of a great majority, if not all, of its employees at that time working in said shipyard and alleges that continuously since said time said Plan of Employees Representation has met the approval of and been operated by said employees. The operation of said plan is described in some detail in Articles 22 and 23 hereof. See Exhibit "C".

Denies that "in June, 1927, and on dates thereafter down to and including the date of the filing of this complaint" your complainant "did foster, encourage, sponsor, domi- [fol. 10] nate and interfere with the formation, enlistment of membership and administration of the said labor organization known as Representation of Employees and did contribute financial and other support thereto and did thereby engage and is engaging in unfair labor practices within the meaning of Section 8, Sub-division 2 of said "Act", as is alleged in paragraph 8 of Exhibit "A". See Exhibit "C".

Denies that as alleged in paragraph 9 of Exhibit "A" your complainant interferred with, restrained and coerced or that it is interfering with, restraining and coercing its employees in the exercise of the rights alleged by said Board to be guaranteed its said employees in Section 7 of said Act, and denies that it did engage in and is engaging in unfair labor practices within the meaning of said Act. See Exhibit "C".

Alleges that the matters and things set up in paragraphs 10 and 11 in said Exhibit "A" are frivolous and alleges that the matters and things therein and in paragraph 12 of said Exhibit "A" alleged are not true in fact and denies that there is any labor dispute between your complainant and its employees.

The action by the National Labor Relations Board, its agents or agencies, including the defendants herein, to prevent the complainant from engaging in any practices which said Board alleges constitute some of the so-called unfair labor practices defined in the Act constitutes an unwarranted and unlawful inter-meddling and interference by said Board in the business and affairs of complainant. In charging that complainant was engaging in unfair labor practices the said Board is undertaking to hold the complainant up to public scorn as a violator of a law of the United States and thereby is undertaking to cause it to incur the odium and ill will of the public and to be in disrepute, and is holding the complainant up to the scorn of its employees and the public as an employer engaged in unfair labor practices to the detriment and injury of those persons employed by it, thereby causing it to incur the odium and ill will of such persons and the public and to be in disrepute therewith. Such public scorn of, odium of, ill will toward [fol. 11] and disrepute of the complainant and such scorn of, odium of, ill will toward and disrepute of the complainant on the part of those employed by it will continue and be magnified so long as the aforesaid hearing shall be scheduled and shall continue so long as any proceedings connected therewith shall ensue and be continued.

(13) Complainant is advised, believes and therefore alleges that the National Labor Relations Board, its agents and agencies, including the defendants herein, intend to and unless restrained by this Honorable Court, will forthwith exercise the power which Section 11(1) of the Act purports to confer upon them and will send and cause to be sent into its shipyard investigators, agents and representatives for the purpose of examining complainant's books and records and interviewing complainant's employees and will issue or cause to be issued subpœnas requiring the attendance and testimony of complainant's officials and employees and the production of any evidence which they may deem relevant to said hearing or any other investigation pre-

scribed by the National Labor Relations Board with respect thereto. Such attendance and the production of such evidence pursuant to the provisions of Section 11(1) of the Act may be required from any place in the United States, or any territory or possession thereof, at any designated place of hearing. Such attendance and such production of evidence wherever required will entail great loss in time and money to the complainant, thereby increasing its cost of operation, will involve public disclosure of complainant's private books, records, documents and trade secrets, thereby invading the rights of complainant and will disrupt and interfere with the business of the complainant. Furthermore, in order that the complainant may resist the charges which have been brought against it by the Industrial Union of Marine and Shipbuilding Workers of America, as referred to in the aforesaid complaint, it will be necessary that it incur great expense for counsel fees and for traveling and other expenses, all of which are irrecoverable. And furthermore, in accordance with Section 37 of Article II of Rules and Regulations—Series 1 of the National Labor Relations Board as amended, further hearings may be held in Washington, D. C. or at any other place in the United [fol. 12] States, or may be consolidated with any other proceedings which may have been instituted in this region. The holding of any such further hearings or the consolidation of this hearing with any other hearing would put the complainant to further and added expense in order to protect its rights in any proceedings had at any place to which such hearings should be transferred or to such other place where such consolidated hearing may be held, none of which expense would be recoverable. Furthermore, as complainant is advised and believes and therefore alleges, the National Labor Relations Board, its agents and agencies, including the defendants herein, will require many employees of the complainant to appear before the aforesaid Trial Examiner or before some other Trial Examiner who subsequently shall be designated to conduct such scheduled hearing, as witnesses, the appearance of whom at such hearing will interfere with, interrupt and cause damage to the business of the complainant, which business must be performed expeditiously and without interference or interruption as is more particularly set out and described in Article 19 hereof.

(14) If the complainant should not permit each member of the National Labor Relations Board and each of its agents and agencies, including the defendants herein, to take any action and to carry out any purposes the taking or carrying out of which requires that the complainant should not resist, prevent, impede or interfere with any member of said Board or any of its agents or agencies aforesaid in the performance of duties that the Act purports to confer upon them, the complainant will be threatened with the imposition of a fine in the maximum amount of $5,000.00, and the officers and employees of complainant will be threatened with the payment of such a fine or with imprisonment for as much as one (1) year, or both, pursuant to the provisions of Section 12 of said Act. Such fine and imprisonment constitute such a heavy and stringent penalty as to preclude the complainant from seeking to exercise its constitutional rights unless the complainant shall be granted relief by this Honorable Court; and by reason of such threatened fine and imprisonment the complainant cannot prevent the attendance of its officers and employees as witnesses at said hearing, and such officers [fol. 13] and employees will, under threat of fine and imprisonment, be compelled to give at such hearing confidential information pertaining to the business of the complainant which they have gained during their employment by the complainant and which information the complainant is entitled to have preserved as confidential and the disclosure of which would result in great and material damage to the complainant; and such fine and imprisonment constitute such a heavy and stringent penalty as to coerce the complainant into permitting the National Labor Relations Board, its agents and agencies, including the defendants herein, to invade the constitutional rights of the complainant, its officers and employees without legal right.

(15) Under the provisions of the Act, as the National Labor Relations Board, its agents and agencies, including the defendants herein, are attempting to construe and enforce it against the complainant, the complainant will be prohibited from bargaining with any of its employees in respect of rates of pay, wages, hours of employment and other conditions of employment through the Plan of Representation of Employees of the complainant in effect at its ship-

yard as it has done harmoniously and without disturbance or labor trouble for many years, to-wit, since the adoption thereof in June, 1927, which Plan of Representation of Employees is hereinafter more specifically described in Article 23 hereof.

If the complainant shall insist upon so bargaining with its employees in violation of the terms of the Act as so attempted and sought to be construed and enforced against it by the National Labor Relations Board it will be harassed by costly and expensive proceedings which will be or will be caused to be instituted by the said Board or some of its agents or agencies, including the defendants herein, pursuant to the provisions of Section 10 of said Act so that in order to avoid said expenses the complainant might and, in all probability, will be coerced against its wishes and desires to cease bargaining with any of its employees through said Plan of Representation of Employees. By being so coerced the complainant would be deprived of its right freely to bargain and contract with any of its employees and prospective employees through said Plan of Representation of Employees or in any other manner.

[fol. 14] (16) Your complainant believes and therefore alleges that the defendants herein are fully cognizant of and informed regarding said Plan of Representation of Employees in the shipyard of your complainant but that despite the knowledge of said Board, its members, agents and agencies, including the defendants herein, said Board and its agents and agencies, including the defendants herein, issued against your complainant the aforesaid complaint dated June 18, 1937 and scheduled the aforesaid hearing to be held July 8, 1937.

The loss, damage and injury which complainant will suffer as a result of the holding and continuation of the said hearing and any proceedings had thereon or in connection therewith and the taking and carrying out of any action in connection therewith will cause complainant to suffer great and irreparable loss, damage and injury. Said loss, damage and injury is imminent and will be irreparable and cannot be ascertained in a pecuniary value.

(17) Your complainant has the right to maintain pleasant, friendly and harmonious relations with its employees and has the right freely and independently to bargain with any of its employees in respect of rates of pay, wages, hours

of employment and other conditions of employment in any manner which shall be mutually satisfactory to it and to any of such employees. The pecuniary value of such rights and each of them to the complainant is incalculably great and the inviolate maintenance thereof is a further condition to the successful conduct by the complainant of its business. The pendency of and the holding of the hearing scheduled to be held July 8, 1937, the continuation and holding thereof and continuation of any further proceedings thereon or in connection therewith, regardless of the outcome thereof, and the taking or carrying out of any action in connection therewith will prevent complainant from fully maintaining and enjoying the benefits of and exercising such rights, by reason whereof the pleasant, friendly and harmonious relations with its employees will be infringed and damaged and the enjoyments of the benefits thereof will be impeded by reason of the facts herein set forth.

[fol. 15] (18) The fact that the complainant will be impeded as herein described from exercising its right freely and independently to bargain with its employees in respect of rates of pay, wages, hours of employment and other conditions of employment in any manner that shall be mutually satisfactory to it and to them and thereby will be impeded in carrying on its regular business, will result in the complainant's suffering incalculable and heavy damage in the increased cost of performing its shipbuilding contracts and in the loss of prospective profits on its said contracts, neither of which is it possible accurately to estimate in a pecuniary value. Such damage will accrue and increase from day to day and will continue so to accrue and increase so long as the complainant shall be impeded in exercising such right, by the holding and continuation of such hearing and by any proceedings had thereon or in connection therewith, including the prosecution of legal proceedings instituted under the Act, either by the complainant on its own behalf or by the National Labor Relations Board against the complainant, and by the taking and the carrying out of any action in connection therewith, and if and when the complainant shall cease to be so impeded, it will suffer irreparable damage flowing from the fact that the efficiency of such employees will not be as great as it would have been had not the aforesaid disturbed and upset conditions been created and maintained among such employees as a result of said hearing and

the continuation of proceedings thereon and action taken and carried out in connection therewith.

(19) Your complainant now has under construction at its said shipyard nine (9) vessels, aggregating 66,184 tons. Six (6) of said vessels are sea-going and three (3) are harbor vessels. Said vessels may be further classified as follows:

6 For the U. S. Navy	63,900	tons standard displacement
2 Harbor tugs (merchant) 267 tons each	534	gross tons
1 Barge, self-propelled (merchant)	1,730	" "
Total tons	66,184	

[fol. 16] and again, separately classified as follows:

Yorktown, Aircraft Carrier U. S. Navy	20,000	tons standard displacement
Enterprise, Aircraft Carrier U. S. Navy	20,000	tons standard displacement
Boise, Cruiser, U. S. Navy	10,000	tons standard displacement
St. Louis, Cruiser U. S. Navy	10,000	tons standard displacement
Mustin, Destroyer, U. S. Navy	1,960	tons standard displacement
Russell, Destroyer, U. S. Navy	1,960	tons standard displacement
Total	63,920	tons—Navy
Tug Boats (merchant) 267 tons each	534	gross tons
Barge for harbor work	1,730	gross tons
Total tons	2,264	gross tons merchant

The inevitable result of said hearings will be that complainant will be delayed in completing the construction of said vessels and each of them and thus incur the damages and penalties assessable as for demurrage under the contract in each case, and consequent loss of profits. The demurrage payable in case of each of the two aircraft carriers Yorktown and Enterprise is $300.00 per day for the first month and $600.00 per day thereafter for each day delivery is delayed beyond the contract date for delivery, and the demurrage provided for in the contracts for the other vessels is likewise substantial in amount.

(20) The principal aim of those making complaint to and filing the aforesaid charge (Exhibit "B") with the National Labor Relations Board that your complainant has engaged in and is now engaging in the alleged so-called unfair labor [fol. 17] practices set forth in the aforesaid complaint and charge, is to force complainant to cease dealing with any of its employees with respect to rates of pay, wages, hours of employment and other conditions of employment through the Plan of Representation of Employees in operation at complainant's shipyard so that the so-called Committee for Industrial Organization or C. I. O. may organize said shipyard and require the employees thereof to join the C. I. O. and thus effect a closed shop in complainant's shipyard.

The holding and continuation of said hearing and any proceedings had thereon or in connection therewith, and the taking and carrying out of any action in connection therewith, will make it appear that the accomplishment of such aim is in accordance with law and has the support and approval of the Federal Government, and will thus give to those making complaint to said Labor Board the opportunity to claim that the Federal Government supports them in their demands. Such appearance and such claim will disturb conditions at said shipyard and will result in a burden and obstacle to the complainant in maintaining pleasant, friendly and harmonious relations with its employees and enjoying the benefits thereof.

(21) Complainant alleges and charges that The Industrial Union of Marine and Shipbuilding Workers of America, the organization making and filing the aforesaid charge (Exhibit B), is a so-called union or strike organizing association affiliated with the aforesaid "C. I. O." and alleges and charges that said C. I. O. union or organization has no standing amongst the employees in complainant's shipyard and that its sole interest and activity in said shipyard is to organize complainant's employees as set out in article 20 hereof.

The complainant has no adequate remedy at law nor any remedy whatsoever for the prevention of the accrual and continuation of the damage and injury herein described flowing from the unlawful and unwarranted inter-meddling and interference by the National Labor Relations Board, its agents and agencies, including the defendants herein, based on the mistaken and unwarranted charge filed with it

as aforesaid, except by the injunction of this Honorable [fol. 18] Court against the holding and continuation of said hearing and any proceedings had or to be had thereon or in connection therewith and the taking or carrying out of any action in connection therewith.

(22) For the purpose of protecting and promoting the interest of its employees and in order to discuss and adjust matters of mutual interest and in order to avoid reasonable grounds of complaint with respect to rates of pay, wages, hours of employment and other conditions of employment, complainant is now and has heretofore been ready and willing to meet at mutually convenient times with any of its employees claiming directly or indirectly to be the accredited representatives of such employees and has not challenged and does not challenge their right as such, and has been and is willing to consider with them any matters of interest to such employees which they may present to the complainant and the complainant has not dominated or interfered with any representatives of its employees nor with any persons claiming directly or indirectly to be the accredited representatives of such employees either under the said plan of Representation of Employees in effect at said shipyard or otherwise. Complainant has frequently met with persons claiming directly or indirectly to be the accredited representatives of its employees, including the employees representatives under the Plan of Representation of its employees in effect at its shipyard and has considered all matters of interest to employees at said shipyard which have been presented to it.

(23) The Plan of Representation of Employees in effect at your complainant's shipyard provided among other things that the employees shall hold thereunder in the month of June of each year a primary election and final election known respectively as Nominations and Elections. On June 8, 1937, the employees held such nominations and on June 15 they held such elections. 84.7% of the employees who were eligible under said plan to vote at nominations and elections and who were at said shipyard on the day of said nominations, which was a regular working day on which said shipyard was operating at its then normal full time rate, without any domination, interference, intimi- [fol. 19] dation or coercion on the part of the complainant,

cast valid ballots at such nominations, which were counted thereat. On June 15, 1937, 90.8% of such eligible employees who were at said shipyard on the day of such election, which was also a regular working day on which said shipyard was operating at its normal full time rate, without any domination, interference, intimidation or coercion upon the part of the complainant, cast valid ballots at such election. On said day there were present at said shipyard 6,300 voters and of that number 5,718 voters voted, thus arriving at the aforesaid percentage of 90.8.

(24) Complainant further alleges that neither the transaction of its business nor its relations with its employees with respect thereto constitute commerce among the several states or with foreign nations. Nor do they directly affect such commerce, nor do they burden or obstruct such commerce or the free flow thereof, nor have they led nor do they tend to lead to labor disputes burdening or obstructing such commerce or the free flow thereof, nor do such actions, matters or things occur or such relations exist in the course or current of commerce among the several states or with foreign nations, nor are they an integral part of an instrument of such commerce.

(25) Complainant is advised by counsel, believes and charges that the action taken and orders issued by the National Labor Relations Board, its agents or agencies, including the defendants herein, their successors in office, assistants, employees, agents and representatives, and particularly the determination to hold the aforesaid hearing, the issuance of the complaint and notice of hearing dated June 18, 1937, relative to, the holding or attempting to carry out any of the provisions of the Act in connection with, and following upon, said hearing are, and will be, illegal and void for that said Act confers no jurisdiction on said Board over or upon your complainant or the business of your complainant, and for that said Board, its agents and agencies, including the defendants herein, their successors in office, assistants, agents and representatives, are wholly without jurisdiction over your complainant, its officers, agents or employees, or its business, and further that the said action taken and orders issued violate the consti- [fol. 20] tutional rights of your complainant in the foregoing as well as in other respects.

(26) Complainant is advised, believes and alleges that the procedure provided in the Act for the review of orders of the National Labor Relations Board does not afford the complainant a timely, plain, adequate or complete remedy at law since among other reasons the irreparable and irrecoverable damage and imminent injury to the complainant which are hereinabove described and alleged will have been in a very large measure caused and suffered by the complainant before any such review can be had, and that, accordingly, it has no protection for its constitutional and property rights save by the injunctive relief from this Honorable Court to which it is entitled; and furthermore, the remedy purportedly afforded by the Act in law and in fact is not a remedy at all.

(27) Complainant has been advised by counsel, believes therefore and alleges that the procedure provided by the Act for the review of orders of the National Labor Relations Board by the courts of the United States if it be a remedy at all, is not and is not meant as an exclusive remedy and is not a timely or a plain or an adequate or a complete remedy at law; and that the statutory provisions for the review of orders of such Board do not make any provision for an independent judicial determination of all questions, both of law and of fact, essential to the preservation of the constitutional rights of complainant nor is any provision made for an independent judicial determination upon the facts, as well as upon the law, of the existence or non-existence of the fundamental or jurisdictional facts underlying the supposed authority of said National Labor Relations Board, the existence of which is a condition precedent to the operation of the statutory scheme as regards complainant, its employees or its business.

(28) The damages which will accrue to and be suffered by complainant by reason of its being deprived of rights herein set forth are imminent and irreparable, and are not wholly ascertainable in a pecuniary value and complainant would be unable to prove the full or exact amount thereof in any court of law and is without a timely, full, adequate or complete remedy at law.

[fol. 21] (29) This suit involves a controversy arising under the constitution and laws of the United States, and

the matters in interest involved are of value in excess of the sum of $3,000,000. exclusive of interest and costs.

(30) Complainant is advised by counsel, believes and alleges that it is entitled to receive from this Court a declaratory judgment declaring its rights in the premises.

Wherefore, the premises considered, and for as much as your complainant is without remedy save in a court of equity where matters of this kind are only and properly cognizable, your complainant prays that the defendants, Bennet F. Schauffler, individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board, and Jacob Blum, individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board, and the trial examiner, individually and as such Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, and as the National Labor Relations Board, and each of them, be made parties defendant to this bill and be required to answer the same, but not under oath, answers under oath being hereby expressly waived as to each and all of the defendants, and that a temporary restraining order be granted forthwith restraining and enjoining the said defendants and each of them individually and as Regional Director, Regional Attorney and Trial Examiner, respectively, and as the National Labor Relations Board, and each of them and said Board and their and its agents, agencies, assistants, employees and representatives and anyone associated with them and each of them and their successors in office and each of them and their agents, agencies, assistants, employees and representatives from holding or causing to be held at any time or times a hearing for the purpose of determining whether or not the complainant has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto and further to perform and abide by such order, direction and decree as [fol. 22] as to this Honorable Court shall seem meet, just and proper;

That this Honorable Court issue its order against said defendants, Bennet F. Schauffler, individually, and as Regional Director for the 5th Region, National Labor Rela-

tions Board and as the National Labor Relations Board, and Jacob Blum, individually and as Regional Attorney for the 5th Region National Labor Relations Board, and as the National Labor Relations Board, and the trial examiner, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, to show cause, if any they have, at a convenient date to be fixed by this Honorable Court, why an injunction should not be granted restraining the said defendants and each of them, individually and in their representative capacities, and said Board and their and its agents, agencies, assistants, employees and representatives and anyone associated with them, and each of them and their successors in office and each of them and their assistants, agents, agencies, and representatives, and anyone associated with them and each of them, during the pendency of this suit from holding or causing to be held at any time or times a hearing for the purpose of determining whether or not the complainant has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Board and from having any proceedings or taking any action whatsoever at any time or times with respect thereto, and that this Honorable Court thereupon grant and issue pendente lite a preliminary injunction enjoining said defendants and each and every one of them, individually and in their representative capacities and said Board from holding or causing to be held at any time or times a hearing for the purpose of determining the aforesaid facts and from having any proceedings or taking any action whatsoever with respect thereto;

That upon a final hearing this Honorable Court grant and issue a permanent injunction against said defendants and each and every one of them, individually and in their representative capacities and said Board and their and its successors in office, and each of them, and their assistants, [fol. 23] agents, agencies, and representatives, and anyone associated with them, and each of them, enjoining them and each of them, permanently and perpetually from holding or causing to be held at any time or times, a hearing for the purpose of determining whether or not the complainant has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Labor Act, and

from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto; and

That this Honorable Court shall adjudge, order and decree that the defendants' actions and proposed actions under the National Labor Relations Act approved July 5, 1935 in relation to the business of the complainant and in relation between complainant and its employees and among such employees are unconstitutional, void and unenforceable, and that all such other, and that all necessary and proper proceedings may be had and taken for accomplishing the purpose of this bill of complaint and that complainant may have such other and further relief, both general and special, as to equity may seem meet and the nature of the cause may require.

And your complaint will ever pray, etc.

Newport News Shipbuilding and Dry Dock Company, by Counsel, Skinner & Marshall, p. q., Fred H. Skinner, John Marshall, H. H. Rumble.

Duly sworn to by J. B. Woodward. Jurat omitted in printing.

[fol. 24] EXHIBIT "A" TO COMPLAINT

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD, FIFTH REGION

Case No. V-C-82

In the Matter of NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, and INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA

Complaint

It having been charged by the Industrial Union of Marine and Shipbuilding Workers of America that Newport News Shipbuilding and Dry Dock Company, hereinafter called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board, by its Regional

Director for the Fifth Region as agent of the National Labor Relations Board, designated by National Labor Rela-
[fol. 25] tions Board Rules and Regulations, Series 1, as amended, hereby alleges the following:

1. The respondent is, and has been for a long period of time, and is now, and has continuously been, engaged in the construction, overhaul and repair of ships at its plant in Newport News, Virginia.

2. The respondent in the course and conduct of its business causes and has continuously caused a considerable portion of the raw materials used in the manufacture of its product, and on its overhaul and repair of ships, to be purchased and transported in interstate commerce from and through States of the United States other than the State of Virginia, and causes and has continuously caused a considerable portion of the products manufactured by it, and of the ships overhauled or repaired by it, to be transported in interstate commerce from its plant in Virginia, into and through States of the United States other than the State of Virginia, and in commerce with foreign countries.

3. Industrial Union of Marine and Shipbuilding Workers of America, hereinafter referred to as the union, is a labor organization as defined in Section 2, Subdivision 5 of said Act.

4. The respondent while engaged at the Newport News plant, as described above, did, on or about the 3rd day of March, 1937, discharge, and refused, and still refuses to reinstate John M. Darling, Jr.; did, on or about the 24th day of May, 1937, discharge, and refused, and still refuses to reinstate J. G. Royer and Alfred H. Smith; did, on or about the 31st day of May, 1937, discharge, and refused, and still refuses to reinstate W. H. Bell; did, on or about the 1st day of June, 1937, discharge, and refused, and still refuses to reinstate M. L. Anderson and E. B. Wright; did, on or about the 7th day of June, 1937, discharge, and refused, and still refuses to reinstate Jessee Dillon, all, and each of them, being employees of the respondent at its Newport News plant.

5. The respondent discharged, and refuses to reinstate
[fol. 26] the above named individuals, and each of them, for that the above named individuals, and each of them, joined

and assisted the labor organization referred to above as the Industrial Union of Marine and Shipbuilding Workers of America, and engaged in concerted activities with other employees in the Newport News plant of the respondent, for the purpose of collective bargaining and other mutual aid and protection.

6. By the discharge of and refusal to reinstate the above named individuals, and each of them, as above set forth, the respondent did discriminate and is discriminating in regard to the hire and tenure of employment of the above named individuals, and each of them, and did discourage and is discouraging membership in the union, and did thereby engage in and is engaging in unfair labor practices within the meaning of Section 8, Subdivision 3 of said Act.

7. The respondent by its officers and agents did during the year 1927 cause to be put into force and effect at its Newport News plant a plan known as "Representation of Employees". Said plan constitutes a labor organization within the meaning of Section 2, Subdivision 5 of said Act.

8. The respondent, by its officers and agents, while operating as described above, in June, 1927, and on dates thereafter down to and including the date of the filing of this Complaint, did foster, encourage, sponsor, dominate, and interfere with the formation, enlistment of membership and administration of the said labor organization known as "Representation of Employees", and did contribute financial and other support thereto and did thereby engage and is engaging in unfair labor practices within the meaning of Section 8, Subdivision 2 of said Act.

9. By all of said acts, and each of them, enumerated in paragraphs 4, 5 and 6 above; and by all said acts, and each of them, enumerated in paragraphs 7 and 8 above, the respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Na- [fol. 27] tional Labor Relations Act, and by all of said acts and each of them did engage in and is engaging in unfair labor practices within the meaning of Section 8, Subdivision 1 of said Act.

10. The current labor dispute caused by the aforesaid unfair labor practices did burden and obstruct, and continues

to burden and obstruct commerce among the several States and with foreign countries, and the free flow thereof; did interfere and continues to interfere with the execution of orders, sale, distribution and shipments of the products of the respondent in interstate and foreign commerce; did cause and/or tends to cause the diversion of production and the diversion of commerce thereof from and among the several States of the United States and between said States and foreign countries.

11. The activities of the respondent set forth above occurring in connection with the operations of the respondent have a close, intimate and substantial relation to trade, traffic and commerce among the several States and with foreign countries and tend to lead to labor disputes burdening and obstructing said commerce and the free flow of said commerce.

12. The aforesaid acts of the respondent enumerated in paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 above, constitute unfair labor practices affecting commerce within the meaning of Section 8, Subdivisions 1, 2 and 3, and Section 2, Subdivisions 6 and 7 of said Act.

Wherefore, the National Labor Relations Board on this 18th day of June, 1937, issues its complaint against the Newport News Shipbuilding and Dry Dock Company, respondent herein.

Notice of Hearing

Please Take Notice that on the 8th day of July 1937, at 10:00 o'clock in the forenoon, in the Corporation Court, Municipal Building, Newport News, Virginia, a hearing will be conducted before the National Labor Relations Board by a Trial Examiner to be designated by it in accordance with [fol. 28] said Rules and Regulations, Series 1, as amended, Article IV, Section 3, and Article II, Section 23 on the allegations set forth in the complaint attached hereto, at which time and place you will have the right to appear, in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Regional Director for the Fifth Region, with offices at 603 U. S. Appraisers' Store Building, Baltimore, Maryland, acting in this matter as the agent of the National

Labor Relations Board, an answer to the attached complaint on or before the 29th day of June, 1937.

Enclosed herewith for your information is a copy of the Rules and Regulations, Series 1, as amended, made and published by the National Labor Relations Board pursuant to authority granted in the National Labor Relations Act. Your attention is particularly directed to Article II of said Rules and Regulations.

In Witness Whereof the National Labor Relations Board has caused this, its complaint and notice of hearing to be signed by the Regional Director for the Fifth Region on the 18th day of June, 1937.

(S.) Bennet F. Schauffler, Regional Director.

EXHIBIT "B" TO COMPLAINT

Charge

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD, 5TH REGION

Jun. 4, 1937.

Case No. V-C-82

In the Matter of NEWPORT NEWS SHIPBUILDING AND DRY [fol. 29] DOCK CO. and INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Newport News Shipbuilding and Dry Dock Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (2) & (3) of said Act, in that

1. The respondent on or about March 3, 1937 discharged and refused to reinstate and still refuses to reinstate John M. Darling, Jr.; and on or about May 31, 1937 did discharge and refused to reinstate and still refuses to reinstate W. H. Bell; and on or about June 1, 1937 did discharge and refused to reinstate and still refuses to reinstate M. L. Anderson and E. B. Wright; all employees of the respondent at the Newport News plant, because they joined and assisted a labor organization of their own choosing and engaged in

concerted activities with fellow employees for collective bargaining and other mutual aid and protection.

2. The respondent, its servant or agents, are dominating and interfering with the employees' right of self-organization by sponsoring, dominating, interfering with and lending financial support to a so-called labor organization known as "Representation of Employees" in the plant of Newport News Shipbuilding and Dry Dock Co., Newport News, Virginia.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

Philip H. Van Gelder, Secretary-Treasurer Industrial Union of Marine and Shipbuilding Workers of America, 2332 Broadway, Camden, N. J.

[fol. 30] Subscribed and sworn to before me this 4th day of June, 1937. Ada E. Hornsby, Notary Public.

NATIONAL LABOR RELATIONS BOARD 29

RULES AND REGULATIONS

SERIES 1, AS AMENDED

AND

NATIONAL LABOR RELATIONS ACT

(48 STAT. 449)

APRIL 27, 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

NATIONAL LABOR RELATIONS BOARD

J. WARREN MADDEN, *Chairman*
JOHN M. CARMODY
EDWIN S. SMITH
BENEDICT WOLF, *Secretary*
CHARLES FAHY, *General Counsel*

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NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

RULES AND REGULATIONS

SERIES 1, AS AMENDED

GENERAL RULES AND REGULATIONS

By virtue of the authority vested in it by the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board hereby issues the following Rules and Regulations—Series 1—as amended (General Rules and Regulations), which it finds necessary to carry out the provisions of said Act. Said Rules and Regulations—Series 1—as amended shall become effective upon the signing of the original by the members of the Board and upon the publication thereof in the Federal Register, and shall supersede the Rules and Regulations—Series 1—as amended (General Rules and Regulations) signed by the Board on April 15, 1935, which are hereby rescinded. The Rules and Regulations—Series 1—as amended (General Rules and Regulations) shall be in force and effect until amended or rescinded by rules and regulations hereafter made and published by the Board.

Signed at Washington, D. C., this 27th day of April 1936.

J. WARREN MADDEN, *Chairman.*
JOHN M. CARMODY, *Member.*
EDWIN S. SMITH, *Member.*

ARTICLE I

DEFINITIONS

SECTION 1. The terms "person", "employer", "employee", "representatives", "labor organization", "commerce", "affecting commerce", and "unfair labor practice", as used herein, shall have the meanings set forth in Section 2 of the National Labor Relations Act, a copy of which Act is appended hereto.

SEC. 2. The term "Act" as used herein shall mean the National Labor Relations Act, and the term "Board" shall mean the National Labor Relations Board.

SEC. 3. The term "Region" as used herein shall mean that part of the United States or any Territory thereof fixed by the Board as a particular Region.

SEC. 4. The term "Regional Director" as used herein shall mean the agent designated by the Board as Regional Director for a particular Region.

SEC. 5. The term "Trial Examiner" as used herein shall mean the Board, its member, agent or agency conducting the hearing.

SEC. 6. The term "State" as used herein shall include all States, Territories, and possessions of the United States and the District of Columbia.

ARTICLE II

PROCEDURE UNDER SECTION 10 OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

CHARGE

SECTION 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. A charge may be withdrawn only with the consent of the Regional Director with whom such charge was filed or of the Board. Upon withdrawal of any charge, the Regional Director shall dismiss any complaint based thereon.

SEC. 2. Except as provided in Section 37 of this Article, such charge shall be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of such Regions.

SEC. 3. Such charge shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of such charge shall be filed. A blank form for making a charge will be supplied by the Regional Director upon request.

SEC. 4. Such charge shall contain the following:

(*a*) The full name and address of the person or labor organization making the charge.

(*b*) The full name and address of the person against whom the charge is made (hereinafter referred to as the "respondent").

(*c*) A clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence.

COMPLAINT

SEC. 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties to the proceeding") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the service of the complaint. A copy of the charge shall be attached to the complaint.

SEC. 6. Upon his own motion or upon proper cause shown by any of the parties to the proceeding the Regional Director issuing the complaint may extend the date of such hearing.

SEC. 7. Any such complaint may be amended by the Trial Examiner or the Board in his or its discretion at any time prior to the issuance of an order based thereon, upon such terms as may be deemed just.

SEC. 8. Any such complaint may be withdrawn before the hearing by the Regional Director on his own motion.

SEC. 9. If, after the charge has been filed, the Regional Director declines to issue and cause to be served a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director.

ANSWER

SEC. 10. The respondent shall have the right, within five days from the service of the complaint, to file an answer thereto. Such answer shall contain a short and simple statement of the facts which constitute the grounds of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Board.

SEC. 11. Such answer shall be filed with the Regional Director issuing the complaint. Such answer shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post-office address of the respondent. The respondent shall file three additional copies of the answer for the use of the Board. Im-

mediately upon filing his answer the respondent shall serve a copy thereof upon each of the other parties to the proceeding.

SEC. 12. Upon his own motion or upon proper cause shown by respondent the Regional Director issuing the complaint may by written order extend the time within which the answer shall be filed.

SEC. 13. In any case where a complaint has been amended the respondent shall have an opportunity to amend his answer within such period as may be fixed by the Trial Examiner, if he amends the complaint, or by the Board, if it amends the complaint.

MOTIONS

SEC. 14. All motions made previous to or subsequent to the hearing shall be filed in writing with the Regional Director issuing the complaint, and shall briefly state the order or relief applied for and the grounds for such motion. The moving party shall file an original and three additional copies of all such motions for the use of the Board. Immediately upon the filing of such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding. All motions made at the hearing (except motions to intervene, as provided in Section 19 of this Article) shall be stated orally and included in the stenographic report of the hearing.

SEC. 15. The Trial Examiner designated to conduct the hearing shall rule upon all motions (except as provided in Sections 6, 12, and 19 of this Article). The Trial Examiner may, before the hearing, rule on motions filed previous to the hearing, and shall file his ruling, and any order in connection therewith, with the Regional Director issuing the complaint. The Regional Director shall cause copies thereof to be served upon the parties to the proceeding. Rulings on motions, and any orders in connection therewith, if announced at the hearing, shall be stated orally and included in the stenographic report of the hearing; in all other cases they shall be issued in writing and filed with the Regional Director, who shall cause a copy of the same to be served upon each of the parties to the proceeding, or shall be contained in the Intermediate Report. Whenever the Trial Examiner has reserved his ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to Section 37 of this Article, the Board shall rule on such motion.

SEC. 16. All motions, rulings, and orders shall become part of the record in the proceeding, and rulings and orders claimed to be substantially prejudicial shall be reviewed by the Board, upon request made for such review, in conjunction with the Board's consideration of the Intermediate Report.

SEC. 17. If any motion in the nature of a motion to dismiss the complaint is granted by the Trial Examiner, the party making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., stating the grounds for review, and filing a copy of such request with the Regional Director and the other parties to the proceeding. Unless such request for review is filed within ten days from the date of the order of dismissal, the case shall be considered closed. The Board may, upon motion made within a reasonable period and for good cause shown, reopen the record for further proceedings.

SEC. 18. The right to make motions or to make objection to rulings upon motions shall not be deemed waived by the filing of an answer or by other participation in the proceedings before the Trial Examiner or the Board.

INTERVENTION

SEC. 19. Any person or labor organization desiring to intervene in any proceeding shall file a motion in writing with the Regional Director issuing the complaint setting out the grounds upon which such person or organization claims to be interested. The original of such motion shall be signed and sworn to by the person or labor organization filing the motion, who shall file three additional copies of such motion for the use of the Board. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding. The Regional Director shall rule upon all such motions filed prior to the hearing, and the Trial Examiner shall rule upon all such motions filed at the hearing, in the manner set forth in Section 15 of this Article. The Regional Director or the Trial Examiner, as the case may be, may by order permit intervention in person or by counsel to such extent and upon such terms as he shall deem just. The Regional Director shall cause a copy of said ruling to be served upon each of the parties to the proceeding.

WITNESSES AND SUBPENAS

SEC. 20. Witnesses shall be examined orally under oath, except that for good and exceptional cause the Trial Examiner may permit their testimony to be taken by deposition under oath. Any such deposition shall be taken in accordance with the procedural requirements for the taking of depositions provided by the law of the State in which the hearing is pending.

SEC. 21. Any member of the Board may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or docu-

ments that relate to any matter under investigation or in question, before the Board, its member, agent, or agency, conducting the hearing or investigation. Applications for the issuance of such subpenas may be filed by any party to the proceedings with the Regional Director, or, during the hearing, with the Trial Examiner. Such applications shall be timely and shall specify the name of the witness and the nature of the facts to be proved by him, and must specify the documents, the production of which is desired, with such particularity as will enable them to be identified for purposes of production.

SEC. 22. Witnesses summoned before the Trial Examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

HEARING

SEC. 23. The hearing for the purpose of taking evidence upon a complaint shall be conducted by a Trial Examiner specifically designated by the Board, by the Chief Trial Examiner, or by the Regional Director. At any time a Trial Examiner may be designated to take the place of the Trial Examiner previously designated to conduct the hearing. Such hearings shall be public, unless otherwise ordered by the Trial Examiner.

SEC. 24. It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. Counsel for the Board, and the Trial Examiner, shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

SEC. 25. Any party to the proceeding shall have the right to appear at such hearing in person, by counsel, or otherwise, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence.

SEC. 26. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

SEC. 27. In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.

SEC. 28. Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be

stated orally, together with a short statement of the grounds of such objection, and included in the stenographic report of the hearing. No such objection shall be deemed waived by further participation in the proceeding.

SEC. 29. Any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the Trial Examiner so directs. The parties shall be entitled to file briefs or written statements only with permission of the Trial Examiner.

SEC. 30. In the discretion of the Trial Examiner, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearing by the Trial Examiner, or by other appropriate notice.

SEC. 31. Contemptuous conduct at any hearing before a Trial Examiner or before the Board shall be ground for exclusion from the hearing. The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall be ground for the striking out of all testimony previously given by such witness on related matters.

INTERMEDIATE REPORT AND TRANSMISSION OF CASE TO THE BOARD

SEC. 32. After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report, which he shall file with the Regional Director issuing the complaint, who will thereafter transmit the original of the Intermediate Report to the Board in Washington, D. C., and cause a copy thereof to be served upon each of the parties to the proceeding. Such report shall contain (*a*) findings of fact, separately stated and numbered, and (*b*) recommendations as to what disposition of the case should be made, which may include, if it be found that respondent has engaged in or is engaging in the alleged unfair labor practice, a recommendation as to what affirmative action should be taken by respondent to bring about a condition in harmony with the law.

SEC. 33. Thereafter the Regional Director issuing the complaint shall forward to the Board in Washington, D. C., the charge, complaint, amended complaint, notice of hearing, answer, amended answer, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which, together with the Intermediate Report and exceptions, shall constitute the record in the case.

EXCEPTIONS TO THE RECORD AND INTERMEDIATE REPORT

SEC. 34. If any party desires to take an exception to the Intermediate Report or to any other part of the record (including

rulings upon all motions or objections) he shall within ten days from the date of service of the Intermediate Report file with the Board at Washington, D. C., four copies of a statement in writing setting forth such exceptions. Immediately upon the filing of the statement of exceptions the party filing the same shall serve a copy thereof upon each of the other parties to the proceeding. Upon proper cause shown, the Board may extend the period within which to file a statement of exceptions.

SEC. 35. No matter not included in a statement of exceptions may thereafter be objected to before the Board, and failure to file a statement of exceptions shall operate as submission of the case to the Board on the record and the Intermediate Report.

PROCEDURE BEFORE THE BOARD

SEC. 36. Where the Trial Examiner has found in his Intermediate Report that the respondent has engaged in or is engaging in unfair labor practices affecting commerce, the Board may, upon the expiration of the period for filing a statement of exceptions, as provided in Section 34 of this Article, decide the matter forthwith upon the record, or after the filing of briefs, or oral argument, or may reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board or other agent or agency, or may make other disposition of the case. The Board shall notify the parties of the time and place for any such submission of briefs, oral argument, or taking of further evidence.

Where the Trial Examiner has found in his Intermediate Report that the respondent has not engaged in and is not engaging in unfair labor practices affecting commerce, and no exceptions have been filed within the period for filing a statement of exceptions, as provided in Section 34 of this Article, the case shall be considered closed. The Board may, upon motion made within a reasonable period and upon proper cause shown, reopen the record for further proceedings in accordance with this Section.

SEC. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

(*a*) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(*b*) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(*c*) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

SEC. 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may—

(*a*) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

(*b*) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

(*c*) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

(*d*) make other disposition of the case.

The Board shall notify the parties of the time and place of any such submission of briefs, oral argument, or taking of further evidence.

ARTICLE III

PROCEDURE UNDER SECTION 9 (c) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

SECTION 1. A petition requesting the Board to investigate and certify under Section 9 (c) of the Act the name or names of the representatives designated or selected for the purpose of collective bargaining may be filed by any employee or any person or labor organization acting on his behalf (hereinafter referred to as the "petitioner"). Except as provided in Section 10 of this Article, such

petition shall be filed with the Regional Director for the Region wherein the contemplated bargaining unit exists, or, if the contemplated bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. Such petition shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of the petition shall be filed. A blank form for filing such a petition will be supplied by the Regional Director upon request.

SEC. 2. Such petition shall contain the following:

(*a*) The name and address of the petitioner.

(*b*) The name and address of the employer or employers involved, the general nature of their businesses, and the approximate number of their employees.

(*c*) A description of the bargaining unit claimed to be appropriate, the approximate number of employees therein, the number and classifications of employees which the representatives on whose behalf the petition is filed claim to represent, the names of any other known individuals or labor organizations who claim to represent any of the employees in the alleged bargaining unit.

(*d*) A brief statement setting forth the nature of the question or controversy affecting commerce that has arisen concerning representation.

(*e*) Any other relevant facts.

SEC. 3. If it appears to the Board that an investigation should be instituted it shall so direct and (except as provided in Section 10 of this Article) shall authorize the Regional Director to undertake such investigation, and to provide for an appropriate hearing upon due notice, either in conjunction with a proceeding instituted pursuant to Section 5 of Article II of these Rules and Regulations, or otherwise. The Regional Director shall thereupon proceed with such investigation and in connection therewith shall prepare and cause to be served upon the petitioners, upon the employer or employers involved, and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation (all of whom are hereinafter referred to as "the parties to the proceeding"), a notice of hearing upon the question of representation before a Trial Examiner at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing.

SEC. 4. All matters relating to motions, interventions, witnesses, and subpenas shall be governed by the provisions of sections 14 to 22, inclusive, of Article II of these Rules and Regulations.

SEC. 5. The hearing upon the question of representation shall be conducted by a Trial Examiner specially designated by the Board, by the Chief Trial Examiner, or by the Regional Director, and shall be open to the public unless otherwise ordered by the Trial Examiner. At any time a Trial Examiner may be designated to take the place of the Trial Examiner previously designated to conduct the hearing. It shall be the duty of the Trial Examiner to inquire fully into the question of representation. Counsel for the Board, and the Trial Examiner, shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence.

SEC. 6. The introduction of evidence at the hearing and the rights of the parties to the proceedings shall be governed by Sections 25 to 31, inclusive, of Article II of these Rules and Regulations.

SEC. 7. Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 8. The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to certify to the parties to the proceeding the name or names of the representatives that have been designated or selected, or to direct a secret ballot of the employees in order to complete the investigation, or to make other disposition of the matter.

SEC. 9. Where the Board determines that a secret ballot should be taken it shall direct such ballot to be conducted by a designated agent upon such terms as it may specify. Upon conclusion of such ballot the agent conducting the ballot shall prepare an Intermediate Report containing a tally of the ballots, his findings and recommendations, which he shall cause to be served upon the parties to the proceeding. Within five days thereafter the parties to the proceeding may file with the Regional Director any objection to the ballot or the Intermediate Report. If it appears to the Regional Director that any such objection raises a substantial and material issue with respect to the conduct of the ballot he shall issue and cause to be served upon the parties a notice of hearing on said objections before a Trial Examiner. Said Trial Examiner shall consider such objections raised to said ballot and shall prepare and file with the Regional Director a report containing findings and recommendations with respect thereto. Thereafter the Regional Director shall forward to the Board in Washington, D. C., the Intermediate Report of the agent conducting the ballot, the objections filed thereto. the notice of hearing, motions, rulings, orders, the steno-

graphic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which, together with the record previously made, shall constitute the record in the case. The Board shall thereupon proceed as set forth in Section 8 of this Article. If no objection raising a substantial and material issue with respect to the conduct of the ballot is filed to the Intermediate Report of the agent conducting the ballot the Regional Director shall forward directly to the Board in Washington, D. C., the Intermediate Report, which, together with the record previously made, shall constitute the record in the case. The Board shall thereupon proceed as set forth in Section 8 of this Article.

SEC. 10. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may—

(*a*) permit a petition requesting an investigation and certification to be filed with it, and may upon the filing of such petition proceed to conduct an investigation under Section 9 (*c*) of the Act, or direct any Regional Director, or other agent or agency, to conduct such an investigation; or

(*b*) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9 (*c*) of the Act; or

(*c*) at any time after a petition has been filed with a Regional Director pursuant to Section 1 of this Article, order that such petition, and any proceeding which may have been instituted in respect thereto—

(1) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(2) be consolidated, for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same Region; or

(3) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in such other Region, or for any other purpose.

The provisions of this Article shall, insofar as applicable, apply to proceedings conducted pursuant to subsections (*a*), (*b*), and (*c*) (1) of this Section, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board, or by the Regional Director, or other agent or agency, directed to conduct the investigation. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to subsection (*c*) (3) of this Section, the provisions of this Article shall apply to

uch proceeding as if the Board had originally directed that the nvestigation be conducted in the Region to which the transfer is nade.

Article IV

DESIGNATION OF REGIONAL DIRECTORS, EXAMINERS, AND ATTORNEYS AS AGENTS OF THE BOARD

Section 1. All Regional Directors now or hereafter in the employ f the Board are herewith designated by the Board as its agents:

(*a*) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(*b*) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigations, in accordance with Section 9 (c) of the Act.

(*c*) To issue and cause to be served complaints, to amend complaints, and to conduct hearings upon such complaints, in accordance with Section 10 (b) of the Act.

(*d*) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11 (1) of the Act.

Sec. 2. All Examiners now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(*a*) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(*b*) To investigate concerning the representation of employees (including the taking of secret ballots of employees), in accordance with Section 9 (c) of the Act.

(*c*) To have access to and the right to copy evidence, and to administer oaths and affirmations, in accordance with Section 11 (1) of the Act.

Sec. 3. All Attorneys now or hereafter in the employ of the Board re herewith designated by the Board as its agents:

(*a*) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(*b*) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigation, in accordance with Section 9 (c) of the Act.

(*c*) To amend complaints issued under Section 10 (b) of the Act and to conduct hearings upon complaints issued in accordance with Section 10 (b) of the Act.

(*d*) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11 (1) of the Act.

SEC. 4. The foregoing designations shall not be construed to limit the power of the Board to make such special designation of agents as may in its discretion be necessary or proper to effectuate the purposes of the Act.

ARTICLE V

SERVICE OF PAPERS

SECTION 1. Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

SEC. 2. Service of papers by a party on other parties shall be made by registered mail or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. When service is made by registered mail, the return post-office receipt shall be proof of service. When service is made in any manner provided by such law, proof of service shall be made in accordance with such law.

ARTICLE VI

CERTIFICATION AND SIGNATURE OF DOCUMENTS

SECTION 1. The Secretary of the Board, or in the event of his absence or disability, the Assistant Secretary of the Board, shall certify copies of all papers and documents which are a part of any of the files or records of the Board as may be necessary or desirable from time to time.

SEC. 2. The Secretary of the Board, or in the event of his absence or disability, the Assistant Secretary of the Board, is hereby authorized to sign all orders of the Board, and sign and issue all complaints authorized to be issued by the Board.

Article VII

CONSTRUCTION OF RULES

Section 1. These rules and regulations shall be liberally construed to effectuate the purposes and provisions of the Act.

Article VIII

AMENDMENTS

Section 1. Any rule or regulation may be amended or rescinded by the Board at any time.

APPENDIX

NATIONAL LABOR RELATIONS ACT

(48 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences

as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and

any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 [1] approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as the chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

[1] So in original.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individual for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders shall be allowed and paid on the presentation of itemized vouchers

therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice

[1] So in original.

(listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review

of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under inves-

tigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.

[fol. 33] EXHIBIT "C" TO COMPLAINT

Affidavit

COMMONWEALTH OF VIRGINIA,
City of Newport News, to-wit:

E. J. Robeson, Jr., being first duly sworn, deposes and says that he is personnel manager of the Newport News Shipbuilding and Dry Dock Company, the complainant named in the foregoing Bill of Complaint hereto attached, and that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to those matters and things therein stated to be alleged on information or belief, and that as to those matters and things he believes them to be true;

That as said personnel manager he is in charge of and supervises all employment and termination of employment of the employees of said shipbuilding company; that he has read the charge, a copy of which is filed as Exhibit "B" with said Bill of Complaint, to the effect that said shipbuilding company has engaged in and is engaging in unfair labor practices within the meaning of section 8, (1), (2) and (3) of the National Labor Relations Act and says that said charge is not true;

That no labor dispute now exists between said company and its employees, the charge in Exhibit "A" to the contrary notwithstanding;

That complainant has not, as charged by said National Labor Relations Board (Exhibit "A") engaged in any unfair labor practices affecting commerce and specifically has not discharged nor has it refused to reinstate any of the persons named in said Exhibit "A" because they, or any of them, joined and supported a labor organization of their or his own choosing and engaged in concerted activities with fellow employees for collective bargaining and other mutual aid and protection.

And further this deponent saith not.

E. J. Robeson, Jr.

[fol. 34] Subscribed and sworn to before me, Kemper L. Kellogg, a notary public in and for the City of Newport News in the Commonwealth aforesaid, whose commission expires on the 27th day of February, 19[illegible] in my said City of Newport News on this the 25th day of June, 1937. Kemper L. Kellogg, Notary Public. (Seal.)

EXHIBIT "D" TO COMPLAINT—Filed July 14, 1937

Affidavit

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

In Equity. No. 401

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Complainant,

against

BENNET F. SCHAUFLLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; Jacob Blum, Individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; and The Trial Examiner of the National Labor Relations Board, Designated or to be Designated by the National Labor Relations Board, Who is Now Unknown, Individually and as such Trial Examiner and as the National Labor Relations Board, Defendants

[fol. 35] COMMONWEALTH OF VIRGINIA,
City of Newport News, to-wit:

J. B. Woodward, Jr., being first duly sworn, deposes and says that he is the General Manager of the Newport News Shipbuilding and Dry Dock Company and a member of the Board of Directors of said Company; that as such General Manager and Director of said Company he is familiar with the business of said Company and he, the said J. B. Woodward, Jr., further deposes and says:

1. The last vessel overhauled by the Newport News Shipbuilding and Dry Dock Company was the S/S. President Fillmore, the contract for that work being made in March 1929. It is customary in the business to make a distinction between the "overhaul" and the "repair" of a vessel. In the business to "overhaul" means, in general, to make over, to rebuild, while to "repair", in general, means what the word implies, as to put in condition a completed going

vessel; to refit, to make repairs of a comparatively minor nature.

2. Aircraft Carriers Yorktown and Enterprise under construction at the shipyard as set out in Article 19 of the bill of complaint are now on demurrage and said demurrage will accrue and continue to accrue until said vessels are completed and delivered under the terms of the respective contracts for those vessels. The demurrage in the case of the Yorktown is accruing at the rate of $600 a day and the demurrage for the Enterprise is accruing at the rate of $300 per day until August 2, 1937 and thereafter it will accrue at the rate of $600 per day. Should the hearing complained of in said bill of complaint be held before said vessels are completed and delivered the inevitable result thereof would be that the shipyard will be further delayed in the completion and delivery of said vessels and would likewise be delayed in the completion of the other vessels named in said Article 19 for that the attendance and testimony of many of its employees, including superintendents, foremen, quartermen and supervisors will be required and taken at the hearing and further and much greater demurrage would therefore be incurred.

[fol. 36] 3. Vessels built or repaired at the shipyard leave the shipyard "light". That is to say, with no cargo on board. The entire crew is signed on by the master or owner of said vessels respectively.

4. The time required in which to build such vessels as the shipyard is now building for the United States Navy ranges from 30 to 32 months in the case of destroyers and 36 months or more in the case of the cruisers and aircraft carriers.

5. The total production of steel plates, shapes and bars in the United States for the year 1936 was 9,250,000 gross tons. (Figures taken from "Iron Age" January 7, 1937, issue, a trade journal established 1855). The total purchased by the shipyard in the same year was 7,800 gross tons or 8/100 of 1% of the total production in the United States. Steel plates, shapes and bars constitute by far the larger part of all materials used in the shipbuilding industry. The shipyard purchases no foreign made steel plates, shapes or bars in its business.

6. The shipyard annually pays taxes to the State of Virginia in accordance with the statute in such case on the materials employed by it in its business.

And further this deponent saith not.

J. B. Woodward, Jr.

Subscribed and sworn to before me, Kemper L. Kellogg, a Notary Public in and for the City of Newport News in the Commonwealth aforesaid, whose commission expires on the 27th day of February, 1940, in my said City of Newport News on this the 9th day of July, 1937. Kemper L. Kellogg, Notary Public.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPLICATION FOR INJUNCTION—Filed July 14, 1937

To the defendants in the above entitled cause and to their attorneys:

You will please take notice that the complainant in the above entitled cause will move the District Court of the United States for the Eastern District of Virginia at its courtroom in the Post Office Building, Norfolk, Virginia, or the Judge of said Court in Chambers, should said Court be in vacation, on July 6, 1937, at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, for an injunction pendente lite in said cause to continue until the final determination of said cause, enjoining and restraining the defendants, and each of them, and the National Labor Relations Board and all persons who are or may be under the [fol. 38] control of them, or either of them, their agents, agencies, assistants, employees and representatives, and anyone in active concert or participating with them, or either of them, and their successors in office and each of them, and their agents, agencies, assistants, employees and representatives, and anyone in active concert or participating with them, and each of them, during said time, and persons to whom knowledge of this injunction shall come, and each and every — of them, from holding or causing to be held at any time or times until the final determination of this cause, a hearing for the purpose of determining whether or not the

Newport News Shipbuilding and Dry Dock Company, the complainant in the above entitled cause, has engaged in or is engaging in any so-called unfair labor practices under the National Labor Relations Act Public No. 198, 74th Congress, approved July 5, 1935.

Said motion will be made on the ground that said National Labor Relations Board, its officers, agents, agencies, assistants, employees and representatives, are without jurisdiction to hold or cause to be held at any time or times a hearing for the purpose of determining whether or not the Newport News Shipbuilding and Dry Dock Company, the complainant in the above entitled cause, has engaged in or is engaging in any so-called unfair labor practices under the National Labor Relations Act, Public No. 198, 74th Congress, approved July 5, 1935, as charged or alleged in the complaint of said Board signed by the said Bennet F. Schauffler, Regional Director of said Board for the Fifth Region, June 18, 1937, and delivered to said Shipbuilding Company June 21, 1937; that complainant is without a timely, full, adequate or complete remedy at law; that the activities of the complainant occurring in connection with the operations of the complainant do not have a close, intimate and substantial relation to trade, traffic and commerce among the several states and with foreign countries and do not tend to lead to labor disputes burdening and obstructing said commerce and the free flow of said commerce; that should said hearing be held or any proceedings had thereon complainant will suffer immediate and irreparable damages, losses and injuries; that complainant has not engaged in and is not engaging in any [fol. 39] unfair labor practices under said National Labor Relations Act or as defined therein, and that there is no labor dispute between complainant and its employees.

A copy of the bill of complaint to be filed by the Newport News Shipbuilding and Dry Dock Company at the time the above mentioned motion is made, which contains in more detail the grounds of said motion and the position of the complainant with reference thereto, is hereto attached and made a part hereof and particular reference is made thereto.

Yours very truly, Skinner & Marshall, Attorneys for the Complainant.

(Copy of Bill of Complaint Omitted from Transcript.)

UNITED STATES OF AMERICA,
District of Maryland, to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that it appears from the Records of said Court that August Klecka was duly appointed Marshal of the United States in and for the District of Maryland on the 19th day of January, 1934.

I do Hereby Further Certify that on the 1st day of February, 1934, Michael B. Gillease took the prescribed Oath as a Deputy United States Marshal in and for the District of Maryland before me, and that from my personal knowledge I know that said Michael B. Gillease is still in office acting as a Deputy United States Marshal in and for the District of Maryland, in the office of the said August Klecka, United States Marshal.

In Testimony Whereof, I hereunto set my hand and affix the Seal of said District Court, this 29th day of June, A. D., 1937.

(Signed) Arthur L. Spamer, Clerk of said District Court. (Seal.)

[fol. 40] MARSHAL'S RETURN ON NOTICE

Summoned Bennett F. Schauffler, personally copy of Subpoena, copy of Notice and copy of Bill of Complaint, left with him this 29th day of June 1937. Also summoned Jacob Blum, personally copy of Subpoena, copy of Notice and copy of Bill of Complaint, left with him this 29th day of June 1937. Non Est as to The Trial Examiner, as there hasn't been any Trial Examiner appointed to date.

August Klecka, U. S. Marshal, By Deputy (Signed) Michael B. Gillease.

IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIAL APPEARANCE FOR DEFENDANTS—Filed July 14, 1937

To the Clerk of the District Court of the United States for the Eastern District of Virginia:

[fol. 41] You will please enter our special appearance as Attorneys for Bennet F. Schauffler, "National Labor Rela-

tions Board, and as the National Labor Relations Board", Jacob Blum, "National Labor Relations Board, and as the National Labor Relations Board", and the Trial Examiner designated or to be designated by the National Labor Relations Board, "as the National Labor Relations Board", so designated in the above entitled cause.

Said special appearance is made for the sole purpose of objecting to the jurisdiction of this Court over said denominated defendants in the said above-named proceedings.

(S.) Robert B. Watts, Malcolm F. Halliday, Attorneys appearing specially for Bennet F. Schauffler, "National Labor Relations Board, and as the National Labor Relations Board", Jacob Blum, "National Labor Relations Board, and as the National Labor Relations Board", and the Trial Examiner designated or to be designated by the National Labor Relations Board, "as the National Labor Relations Board."

Dated this 3rd day of July, 1937.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO QUASH SUBPŒNA—Filed July 14, 1937

[fol. 42] Now comes Bennet F. Schauffler, "National Labor Relations Board, and as the National Labor Relations Board"; Jacob Blum, "National Labor Relations Board, and as the National Labor Relations Board"; and the Trial Examiner designated or to be designated by the National Labor Relations Board, "as the National Labor Relations Board," denominated defendants herein, and named in the subpœna and bill of complaint as such defendants and appearing specially by Robert B. Watts and Malcolm F. Halliday, their attorneys, and limiting their appearance herein specially and solely for the purpose of this motion, and for no other purpose whatsoever, move the Court to quash the subpœna heretofore issued herein by the Court, and as reasons therefor, assign the following:

1. Bennet F. Schauffler, as affirmatively appears in the bill of complaint, heretofore filed, is not a member of the

National Labor Relations Board and is not the National Labor Relations Board.

2. Jacob Blum, as affirmatively appears in the bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

3. The Trial Examiner designated or to be designated [fol. 43] by the National Labor Relations Board, as affirmatively appears in the bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

4. The said "National Labor Relations Board", as affirmatively appears in the bill of complaint filed by the complainant herein, is, and at all times therein mentioned was, a duly authorized and existing Board of the United States of America, and an agency thereof under the provisions of the National Labor Relations Act, and as such may not be sued at law or in equity as a party defendant or at all without an act of Congress authorizing such suit or proceedings; that no such act of Congress is pleaded in the complainant's bill of complaint, nor has such act of Congress been passed.

5. The "National Labor Relations Board" was not at the time of the filing of this bill or at any time thereafter, an inhabitant of the Eastern District of Virginia nor were any of its members inhabitants of the Eastern District of Virginia at the time of filing the bill or at any time thereafter, and the "National Labor Relations Board" and its members have its and their official residences in the City of Washington, District of Columbia, as affirmatively appears in the bill of complaint.

(S.) Robert B. Watts, Malcolm F. Halliday, Attorneys appearing specially for Bennet F. Schauffler, "National Labor Relations Board, and as the National Labor Relations Board", Jacob Blum, "National Labor Relations Board, and as the National Labor Relations Board", and the Trial Examiner designated or to be designated by the National Labor Relations Board, "as the National Labor Relations Board".

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF SPECIAL APPEARANCE AND MOTION TO QUASH—
Filed July 14, 1937

To the above-named Complainant, and Skinner & Marshall, Its Attorneys:

You and each of you will please take notice that on the 6th day of July, 1937, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled Court, Bennet F. Schauffler, "National Labor Relations Board, and as the National Labor Relations Board", Jacob Blum, "National Labor Relations Board, and as the National Labor Relations Board", and the Trial Examiner designated or to be designated by the National Labor Relations Board, "as the Na-
[fol. 45] tional Labor Relations Board", appearing specially by Robert B. Watts and Malcolm F. Halliday, their attorneys, for the purpose of moving to quash the subpœna issued herein, and for no other purpose, will move to quash said subpœna heretofore issued herein as to each of said denominated defendants.

A copy of said motion to quash said subpœna, as well as a copy of the special appearance heretofore filed in the above-entitled Court, is attached hereto.

(S) Robert B. Watts, Malcolm F. Halliday, Attorneys appearing specially for Bennet F. Schauffler, "National Labor Relations Board, and as the National Labor Relations Board", Jacob Blum, "National Labor Relations Board, and as the National Labor Relations Board", and the Trial Examiner designated or to be designated by the National Labor Relations Board, "as the National Labor Relations Board".

Due service admitted.

Fred H. Skinner, Attorney for Complainant of Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—Filed July 14, 1937

[fol. 46] To the above-named Complainant; and Skinner & Marshall, Its Attorneys:

Please Take Notice that on the 6th day of July, 1937, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, a motion will be made to dismiss the bill of complaint herein, a copy of which motion with the grounds therefor is hereto attached.

(S.) Robert B. Watts, Malcolm F. Halliday, Attorneys for Bennet F. Schauffler, individually and as Regional Director for the Fifth Region, Jacob Blum, individually and as Regional Attorney for the First Region, and the Trial Examiner, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board.

Due service admitted.

Fred H. Skinner, Attorney for Complainant of Counsel.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed July 14, 1937

Now come the defendants, Bennet F. Schauffler, individually and as Regional Director for the Fifth Region, Jacob Blum, individually and as Regional Attorney for the Fifth Region, and the Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, individually and as Trial Examiner of the National Labor Relations Board, and move the Court to dismiss the bill of complaint herein, and as reasons therefor assign the following:

1. The bill of complaint on its face fails to state a cause of action entitling the complainant to the relief prayed for [fol. 48] or any relief in equity against the said defendants.

2. The bill of complaint on its face shows that the complainant is not threatened with or in danger of suffering any great, irreparable or immediate injury cognizable in equity by reason of any matter set forth in the said bill of complaint.

3. It appears on the face of the bill of complaint that this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that the amount or value of the subject matter in dispute as appears in the bill of complaint does not exceed $3,000 exclusive of interests and costs.

4. It appears upon the face of the bill of complaint that no real, substantial or colorable dispute or controversy involving the Constitution and laws of the United States is involved.

5. It appears upon the face of the bill of complaint that the complainant by following the procedure set forth in the National Labor Relations Act would not be deprived of property without due process of law and would not be denied the equal protection of the law.

6. The said bill of complaint on its face fails to state a case or controversy of a justiciable question for the determination of this Honorable Court within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States.

7. The said bill of complaint on its face fails to show an "actual controversy" within the meaning of the Federal Declaratory Judgment Act, Section 274-D of the Judicial Code (Section 400, Title 28, U. S. Code).

8. It appears on the face of the bill of complaint that granting the relief prayed would constitute an invasion of the powers of the legislative and executive branches of the Federal government and is further a usurpation of the authority exclusively vested in the Circuit Court of Appeals by the National Labor Relations Act.

[fol. 49] 9. It appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law under the provisions of the National Labor Relations Act with respect to any rights growing out of the matters alleged in the bill of complaint.

10. It appears on the face of the bill of complaint that complainant has failed to resort to any of its administrative remedies and has failed to exhaust its said remedies which afford a plain, adequate and complete remedy with respect to any rights of the complainant involved in this case.

11. It appears on the face of the bill of complaint that the only power of the defendant Bennet F. Schauffler is to cause a hearing to be conducted, with no enforceable obligations on the part of the complainant involving any fine or penalty whatsoever to comply therewith unless and until (a) a hearing has been conducted by the Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board; (b) the Trial Examiner files an intermediate report with the National Labor Relations Board containing findings and recommendations in which findings and recommendations the Trial Examiner determines (1) the Board has jurisdiction in the premises and (2) the complainant has committed unfair labor practices affecting commerce within the meaning of Section 8 of said Act; (c) the matter has been reviewed by the National Labor Relations Board; (d) a final decision is subsequently made by the National Labor Relations Board, adverse to complainant, and after a determination that the Board has jurisdiction in the premises and after a determination that the complainant has committed unfair labor practices affecting commerce; (e) upon the said decision an order is issued by the National Labor Relations board requiring the complainant to cease and desist and end its unfair labor practices as found; (f) complainant refuses to comply with the Board's order; (g) as application by the National Labor Relations Board to the appropriate Circuit Court of Appeals of the United States is made under the provisions of Section 10 of the National Labor Relations Act to enforce the said order; (h) the said Court of Appeals reviews the case, sustains the order of the Board or some part of it and issues its own order; (i) [fol. 50] the order of the Circuit Court of Appeals is violated by the complainant; (j) said complainant is cited for contempt of court; and (k) said complainant is found by the Court of Appeals to be guilty of contempt of court.

12. It appears on the face of the bill of complaint that it is beyond the power of the defendants under the National

Labor Relations Act to attempt to prosecute or to prosecute in any respect involving any fine, forfeiture or penalty, and there is accordingly no occasion whatever to enjoin the defendants from doing any matter or thing in that respect, all such prosecutions which might be made under the National Labor Relations Act being a matter for determination by the Attorney General of the United States or the Department of Justice or his or its officers or agents, no one of whom is made a party defendant in this cause.

13. The bill of complaint of the complainant fails to show that the said defendants have issued or have immediately threatened to issue or have exercised any power or have immediately threatened to exercise any power or authority to issue any subpœnas requiring or compelling the attendance and testimony of witnesses and the production of any books, papers, records or other documents or to apply to the appropriate District Court of the United States for an order enforcing compliance with any subpœnas, pursuant to Section 11, subdivision (2) of the National Labor Relations Act.

14. Said complainant fails to allege that said moving defendants have claimed, exercised or threatened to exercise any power to prosecute said complainant criminally under Section 12 of the said Act or that the said moving defendants have recommended or requested or threatened to recommend or request that the Attorney General of the United States or the Department of Justice or his or its agents institute a prosecution under Section 12 of the said Act, or that said enforcement authorities have threatened to institute any such prosecution, and said complainant fails further to allege wherein opportunity to the complainant to defend in any such prosecution if any were brought or threatened would not afford a plain, adequate, complete and speedy remedy for the review and redress of any mat-
[fol. 51] ter of law and fact raised in said complaint in connection with the alleged fear of prosecution under said Section 12 of the Act.

15. The National Labor Relations Act is valid and constitutional, and the purpose of the proceedings instituted under said Act, in which the complainant is a party, is the determination in accordance with the provisions of the said Act of the question of whether or not any unfair labor prac-

tices affecting commerce as alleged in the complaint heretofore issued by the National Labor Relations Board have been engaged in by the complainant, the only provisions of law for the determination of the said question being the provisions of the National Labor Relations Act, and the method thereby prescribed being exclusive.

16. The said complainant fails to present a case or controversy for the determination of this Honorable Court within the meaning of Article III, Sections 1 and 2 of the United States Constitution..

17. Large public interests are concerned herein and the issuance of an injunction will seriously embarrass the accomplishment of important governmental ends and will interfere with an agency of the government in the performance of its duties.

Wherefore, the defendants respectfully move this Honorable Court that the bill of complaint be dismissed and that they go hence with their costs.

(S.) Robert B. Watts, Malcolm F. Halliday, Attorneys for Bennet F. Schauffler, individually and as Regional Director for the Fifth Region, Jacob Blum, individually and as Regional Attorney for the Fifth Region, and the Trial Examiner, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board.

[fol. 52] IN UNITED STATES DISTRICT COURT.

[Title omitted]

OPPOSITION OF DEFENDANTS TO MOTION FOR INJUNCTION PENDENTE LITE—Filed July 14, 1937

To the Honorable the Judges of the District Court of the United States for the Eastern District of Virginia:

Now come the defendants, Bennet F. Schauffler, individually and as Regional Director for the Fifth Region, Jacob Blum, individually and as Regional Attorney for the Fifth Region, and the Trial Examiner of the National Labor

Relations Board designated or to be designated by the National Labor Relations Board, individually and as such Trial Examiner, and for their opposition to complainant's motion for an injunction pendente lite, respectfully state as follows:

[fol. 53] 1. For lack of knowledge, defendants deny each and every allegation contained in paragraph (1) of the bill of complaint, except that they admit that complainant is a corporation created and existing under the laws of the Commonwealth of Virginia and is a citizen of the United States and of the Commonwealth of Virginia, and except that they admit that complainant is now and has been for many years engaged in the operation of a shipyard at Newport News, Virginia for the building of vessels.

2. Defendants deny each and every allegation contained in paragraph (2) of the bill of complaint, except that they admit that acting in accordance with the terms of the National Labor Relations Act, the National Labor Relations Board consisting of J. Warren Madden, Edwin S. Smith, and Donald Wakefield Smith, Chairman and Members respectively, issued a complaint and notice of hearing, dated June 18, 1937, and signed by Bennet F. Schauffler, Regional Director, which papers, together with the charge and the Rules and Regulations of the National Labor Relations Board, Series 1, as amended, were served upon complainant on June 21, 1937 at its shipyard at Newport News, Virginia, and except that they admit that the charge is dated June 4, 1937 and was made by Philip H. Van Gelder, Secretary-Treasurer Industrial Union of Marine and Shipbuilding Workers of America, and except that they admit that the notice of hearing notified complainant of a hearing to be conducted on July 8, 1937, at 10 o'clock in the forenoon in the Corporation Court, Municipal Building, Newport News, Virginia before the National Labor Relations Board by a Trial Examiner on the allegations set forth in the complaint attached thereto, and except that, for lack of knowledge, defendants deny that J. Warren Madden is a citizen of the State of Pennsylvania, that Edwin S. Smith is a citizen of the Commonwealth of Massachusetts, and that Donald Wakefield Smith is a citizen of the State of Pennsylvania.

3. Defendants deny each and every allegation contained in paragraph (3) of the bill of complaint, except that they

admit that Bennet F. Schauffler is Regional Director of the National Labor Relations Board in and for the Fifth Re-
[fol. 54] gion, having been designated as such by said Board.

Further with respect to the allegations contained in paragraph (3) of the bill of complaint, defendants aver that the powers and duties of Bennet F. Schauffler, as Regional Director for the Fifth Region, are accurately and completely set forth in said Rules and Regulations of the National Labor Relations Board.

4. Defendants deny each and every allegation contained in paragraph (4) of the bill of complaint, except that they admit that Jacob Blum is a citizen of the United States and of Maryland, residing in Baltimore, Maryland and is Regional Attorney of the National Labor Relations Board in and for the Fifth Region, having been designated as such by said Board.

Further with respect to the allegations contained in paragraph (4) of the bill of complaint, defendants aver that the powers and duties of Jacob Blum, as Regional Attorney for the Fifth Region, are accurately and completely set forth in said Rules and Regulations of the National Labor Relations Board.

5. Defendants deny each and every allegation contained in paragraph (5) of the bill of complaint, except that they admit that a Trial Examiner will be designated by said Board to conduct said hearing to be held on July 8, 1937.

Further with respect to the allegations contained in paragraph (5) of the bill of complaint, defendants aver that the powers and duties of the Trial Examiner to be designated by the National Labor Relations Board are accurately and completely set forth in said Rules and Regulations of the National Labor Relations Board.

6. For lack of knowledge, defendants deny each and every allegation contained in paragraph (6) of the bill of complaint, except that, upon information and belief, defendants admit that at all times material to this case complainant has been engaged in the operation of a shipyard, used in the building of vessels, located at Newport News, Virginia, and, upon information and belief, defendants ad-
[fol. 55] mit that said shipyard contains the necessary facilities and equipment for the conduct of complainant's business.

7. For lack of knowledge, defendants deny each and every allegation contained in paragraph (7) of the bill of complaint.

8. For lack of knowledge, defendants deny each and every allegation contained in paragraph (8) of the bill of complaint.

9. Defendants admit each and every allegation contained in paragraph (9) of the bill of complaint.

10. Defendants admit each and every allegation contained in paragraph (10) of the bill of complaint.

Further with respect to paragraph (10) of the bill of complaint, defendants aver that the hearing to be held on July 8, 1937 is for the purpose of determining whether or not complainant has engaged in or is engaging in unfair labor practices affecting commerce within the meaning of the National Labor Relations Act as alleged in the Board's Complaint.

11. Defendants deny each and every allegation contained in paragraph (11) of the bill of complaint, except that defendants admit that the hearing scheduled to be held on July 8, 1937 is the first hearing scheduled to be held on the Board's Complaint; and except that, for lack of knowledge, defendants deny that the National Labor Relations Board will issue and cause to be served upon complainant an order requiring complainant to cease and desist from unfair labor practices and to take affirmative action.

Further with respect to paragraph (11) of the bill of complaint, defendant's aver that the procedure thus far had and taken under the National Labor Relations Act has been in accordance with said Act and with said Rules and Regulations promulgated by the National Labor Relations Board.

12. For lack of knowledge, defendants deny each and [fol. 56] every allegation contained in paragraph (12) of the bill of complaint, except that defendants deny that the action taken by the Board and the defendants herein constitutes an unwarranted and unlawful intermeddling and interference in the business and affairs of complainant; and except that defendants deny that in issuing its complaint against complainant, the National Labor Relations Board is undertaking to hold complainant up to public scorn as a

violator of the law of the United States; and except that defendants deny that the National Labor Relations Board is thereby undertaking to cause complainant to incur the odium and ill-will of the public and to be in disrepute, and is holding complainant up to the scorn of its employees and the public as an employer engaged in unfair labor practices to the detriment and injury of those employed by it, thereby causing it to incur the odium and ill-will of such persons and the public and to be in disrepute therewith; and except that defendants deny that said alleged public scorn of, odium of, ill-will toward, and disrepute of complainant, and such scorn of, odium of, ill-will toward, and disrepute of complainant on the part of those employed by it, will continue and be magnified so long as the said hearing on the Board's Complaint shall be scheduled and so long as any proceedings connected therewith shall ensue and be continued. Further with respect to paragraph (12) of the bill of complaint, defendants aver that the allegations contained therein with respect to the question of whether or not complainant has committed unfair labor practices affecting commerce is wholly immaterial to and has no bearing on the issues before this Court. The determination of such questions is within the sole province of the National Labor Relations Board subject to the exclusive right of review by the appropriate United States Circuit Court of Appeals as provided in the National Labor Relations Act.

13. Defendants deny each and every allegation contained in paragraph (13) of the bill of complaint.

Further with respect to paragraph (13) of the bill of complaint, defendants aver that they have no power to issue subpœnas requiring the attendance of witnesses and the production of evidence and that the power to issue subpœnas is within the sole province of the members of the [fol. 57] National Labor Relations Board, which members, upon information and belief, have not issued and have not threatened to issue any subpœnas; and defendants further aver that even the members of the National Labor Relations Board have no power to compel obedience to subpœnas issued, and that the sole power to compel obedience to subpœnas issued by members of the National Labor Relations Board is within the appropriate United States District Court. Defendants further aver that no proceeding has been commenced or threatened in the appropriate United

States District Court to compel enforcement of subpœnas, and they further aver that in the event such a proceeding before a United States District Court should be had, complainant would at that time have ample opportunity to defend and raise all pertinent issues. Defendants further aver that the sole purpose of the hearing scheduled to be held is to aid the National Labor Relations Board in determining whether or not complainant has engaged in or is engaging in unfair labor practices affecting commerce as defined in the National Labor Relations Act. Defendants further aver that neither they nor the National Labor Relations Board have any interest in matters beyond or outside the scope of the allegations of the Board's Complaint.

14. Defendants deny each and every allegation contained in paragraph (14) of the bill of complaint.

Further with respect to paragraph (14) of the bill of complaint, defendants aver that Section 12 of the National Labor Relations Act is wholly immaterial to and has no bearing on the issues before this Court. Section 12 of the National Labor Relations Act is a criminal provision for the protection of the members of the National Labor Relations Board and its agents and employees in the performance of their duties. It has not been alleged that complainant has violated Section 12 of said Act, and the defendants do not anticipate that complainant will violate Section 12. The defendants and the National Labor Relations Board have no powers with respect to Section 12 of said Act. A prosecution under Section 12 is within the sole province of the appropriate United States Attorneys, no one of whom has commenced any prosecution under said Act and no one [fol. 58] of whom has been requested to commence any such prosecution. Defendants further aver that Section 12 of the National Labor Relations Act neither compels the attendance of complainant's officers and employees at a hearing before the Board nor does it compel the disclosure of confidential information.

15. Defendants deny each and every allegation contained in paragraph (15) of the bill of complaint.

16. Defendants deny each and every allegation contained in paragraph (16) of the bill of complaint, except that defendants admit that the National Labor Relations Board

has issued a complaint against complainant and scheduled a hearing thereon for July 8, 1937.

Further with respect to paragraph (16) of the bill of complaint, defendants aver that the continuation of this injunction proceeding would involve more expense to complainant than the proceeding before the National Labor Relations Board. Defendants further aver that complainant has failed to allege any damage cognizable in equity and that complainant has an adequate remedy under the procedure of the National Labor Relations Act.

17. Defendants deny each and every allegation contained in paragraph (17) of the bill of complaint.

Further with respect to the allegations contained in paragraph (17) of the bill of complaint, defendants aver that the purpose of the proceeding scheduled before the National Labor Relations Board is to determine whether or not complainant has engaged in or is engaging in unfair labor practices affecting commerce within the meaning of the National Labor Relations Act. Defendants further aver that the allegations contained in said paragraph (17) with respect to complainant's labor relations are wholly immaterial to and have no bearing upon the issues before this Court. Defendants further aver that the proceeding before the National Labor Relations Board has nothing to do with the discouragement of pleasant and harmonious relations between complainant and its employees, and further aver that the continuation of a proceeding pursuant to the terms of the National Labor Relations Act will promote [fol. 59] pleasant, friendly, and harmonious relations between complainant and its employees and between employers and employees in general.

18. Defendants deny each and every allegation contained in paragraph (18) of the bill of complaint.

Further with respect to paragraph (18) of the bill of complaint, defendants aver that the proceeding before the National Labor Relations Board has no relation to the efficiency of complainant's employees and that the tendency of the continuance of such proceeding will be to increase the efficiency of said employees.

19. For lack of knowledge, defendants deny each and every allegation contained in paragraph (19) of the bill of complaint, except that defendants deny that the inevita-

ble result of said hearing will be that complainant will be delayed in completing the construction of vessels now under construction at complainant's shipyard and will incur damages and penalties assessable as for demurrage under the contracts covering such construction.

20. Defendants deny each and every allegation contained in paragraph (20) of the bill of complaint, except that, for lack of knowledge, defendants deny the allegations contained in said paragraph with respect to the aim of the parties who filed charges of unfair labor practices affecting commerce against complainant with the Board.

Further with respect to paragraph (20) of the bill of complaint, defendants aver that the proceeding scheduled to be held before the National Labor Relations Board is in accordance with the provisions of the National Labor Relations Act.

Further with respect to paragraph (20) of the bill of complaint, defendants aver that the allegations contained therein are wholly immaterial to and have no bearing upon the issues before this Court.

21. For lack of knowledge, defendants deny each and every allegation contained in the first paragraph of paragraph (21) of the bill of complaint, and aver that the al- [fol. 60] legations contained therein are wholly immaterial to and have no bearing upon the issues before this Court.

Defendants deny each and every allegation contained in the second paragraph of paragraph (21) of the bill of complaint.

Further with respect to the allegations contained in the second paragraph of paragraph (21) of the bill of complaint, defendants aver that complainant has a plain, adequate, and complete remedy under the provisions of the National Labor Relations Act with respect to the rights growing out of the matters and things alleged therein, and defendants further aver that no jurisdiction in equity exists by reason of the matters and things alleged therein.

22. For lack of knowledge, defendants deny each and every allegation contained in paragraph (22) of the bill of complaint, and aver that the allegations contained therein are wholly immaterial to and have no bearing upon the issues before this Court.

23. For lack of knowledge, defendants deny each and every allegation contained in paragraph (23) of the bill of complaint, and aver that the allegations contained therein are wholly immaterial to and have no bearing upon the issues before this Court.

24. For lack of knowledge, defendants deny each and every allegation contained in paragraph (24) of the bill of complaint, and aver that the allegations contained therein are wholly immaterial to and have no bearing upon the issues before this Court.

25. Defendants deny each and every allegation contained in paragraph (25) of the bill of complaint.

Further with respect to the allegations contained in paragraph (25) of the bill of complaint, defendants aver that the proceeding scheduled to be held before the National Labor Relations Board is in accordance with the law, and that the purpose of said proceeding is to determine whether [fol. 61] or not complainant has committed unfair labor practices affecting commerce within the meaning of the National Labor Relations Act.

26. Defendants deny each and every allegation contained in paragraph (26) of the bill of complaint.

27. Defendants deny each and every allegation contained in paragraph (27) of the bill of complaint.

28. Defendants deny each and every allegation contained in paragraph (28) of the bill of complaint.

29. Defendants deny each and every allegation contained in paragraph (29) of the bill of complaint.

30. Defendants deny each and every allegation contained in paragraph (30) of the bill of complaint.

Further answering allegations contained in complainant's bill of complaint, defendants aver as follows:

31. The validity and constitutionality of the National Labor Relations Act, in its entirety, has been sustained by the Supreme Court of the United States (The Associated Press v. National Labor Relations Board, 57 S. Ct. 650; Washington, Virginia & Maryland Coach Company v. Same, 57 S. Ct. 648; Same v. Jones & Laughlin Steel Corp., 57 S. Ct. 615; Same v. Fruehauf Trailer Co., 57 S. Ct. 642;

Same v. Friedman-Harry Marks Clothing Co., 57 S. Ct. 645). The Act provides the only law for the determination of the questions involved in the proceeding scheduled before the National Labor Relations Board, and the remedies provided by the National Labor Relations Act are exclusive.

32. Complainant is engaged in interstate commerce and is dependent on interstate commerce for its existence. Upon information and belief, defendants allege that complainant, in the course and conduct of its business, causes and has continuously caused a considerable portion of the materials used in the manufacture of its products and on its overhauled and repaired ships to be purchased and transported in interstate commeree from and through States of the [fol. 62] United States other than the Commonwealth of Virginia, and causes and has continuously caused a considerable portion of its products manufactured by it and of the ships overhauled and repaired by it to be transported in interstate commerce from its plant in the Commonwealth of Virginia into and through States of the United States other than the Commonwealth of Virginia, and in commerce with foreign countries. But, whether or not complainant is engaged in interstate commerce and whether or not complainant has committed unfair labor practices affecting commerce, must be determined in accordance with the provisions and procedure prescribed by the National Labor Relations Act. Such questions have no bearing upon and are not material to the issues before this Court.

33. The hearing which is scheduled to be held on July 8, 1937, and which undoubtedly will be held in the future, does not involve any threat, danger, or possibility of harm or injury to complainant, and is seheduled or will be scheduled in accordance with the terms of the National Labor Relations Act and the Rules and Regulations of the National Labor Relations Board, promulgated pursuant to said Act.

34. The defendants have no power to make any order affecting the complainant. The power to make orders under the National Labor Relations Act is within the sole province of the National Labor Relations Board.

35. The issuance of any order by the National Labor Relations Board against the complainant is neither imminent nor certain as the same is a matter of future determination;

no order can be made by the National Labor Relations Board in any event until after a hearing is held with a full opportunity for the complainant to offer testimony, present evidence, examine and cross-examine witnesses and to raise any and all objections to the jurisdiction of the National Labor Relations Board; and defendants further aver that the National Labor Relations Board may thereafter, depending upon the evidence in the hearing based upon Section 10 of the Act, do any of the following: (a) dismiss the complaint for lack of jurisdiction, in that the unfair labor practices charged therein may not be shown to affect commerce; (b) [fol. 63] dismiss the complaint for lack of proof of the commission of or engaging in by the complainant of any of the unfair labor practices charged therein, and (c) dismiss the complaint in part and sustain the same with respect to the allegations which have been established and thereafter issue a final decision and a cease and desist order with respect to the unfair labor practices which have been established.

36. The issuance of a cease and desist order by the National Labor Relations Board against complainant, pursuant to the provisions of Section 10 of the Act, involves no restraint or legal compulsion upon complainant, no fine, forfeiture, or penalties are incurred by complainant for non-compliance or disobedience of such order, and such order is not enforceable as such under the Act. Should the Board issue such order against the complainant, the same would not become enforceable unless and until: (a) the Board applies to the appropriate Circuit Court of Appeals under Section 10 (e) of the National Labor Relations Act for an order directing compliance by the complainant with such order, or the complainant petitions the Circuit Court of Appeals under Section 10 (f) of the Act for a review of the Board's order, either of the foregoing procedures being based upon the entire record of the proceedings before the Board with full opportunity to complainant for a review of said order upon the merits and for determination of all of the constitutional and jurisdictional questions; (b) the Circuit Court of Appeals reviews the case, sustains the order or some part thereof and issues its own final order. The enforceability of any order which may thereafter be made by the Circuit Court of Appeals would arise not by virtue of any of the provisions of the Act but by virtue of

the powers inherent in the Circuit Court of Appeals as a duly constituted court of law to enforce its own order.

37. The foregoing procedure under the National Labor Relations Act affords the complainant a full, adequate, complete and exclusive remedy. No fine, forfeitures, restraints or penalties of any kind are involved and no order of the Board can be enforced unless and until the Circuit Court of [fol. 64] Appeals has finally heard and determined all issues and has rendered its own final order and no order is rendered by the Circuit Court of Appeals until the complainant has been afforded a full opportunity to be heard by said Court on said questions, constitutional, jurisdictional, and otherwise. The Circuit Court of Appeals will not in any event issue an order directing compliance with the National Labor Relations Board's order unless and until it determines: (a) that the Act is applicable to the complainant; and (b) that the evidence supports the findings and decisions of the Board as to the merits.

Any order directing compliance thereafter issued by the Circuit Court of Appeals would be based upon an adjudication by a duly established Federal court on the very questions which the complainant seeks to raise prematurely and collaterally by this action in equity.

38. The complainant has failed to resort to any of its remedies and has failed to exhaust its administrative remedies which afford a plain, adequate and complete remedy with respect to any rights of the complainant involved in this proceeding.

39. The said bill of complaint fails to present a case or controversy for determination of this Honorable Court within the meaning of Article III, Sections (1) and (2) of the United States Constitution.

40. There are no allegations in the bill of complaint sufficient to show that the complainant is threatened with or is in danger of suffering any great, irreparable or immediate injury cognizable in equity by reason of any of the matters set forth in the bill of complaint.

41. The complainant has a plain, adequate and complete remedy under the provisions of the National Labor Relations Act with respect to the rights growing out of matters and things alleged in the bill of complaint.

42. It is beyond the power of the defendants or the Board to prosecute or attempt to prosecute the complainant in any respect involving any fine, penalty or forfeiture.

[fol. 65] 43. The said bill of complaint fails to show an actual controversy within the meaning of the Federal Declaratory Judgment Act, (Section 274-D) of the Judicial Code Section 400, Title 28, U. S. Code).

44. Large public interests are concerned herein and the issuance of an injunction will seriously embarrass the accomplishment of important governmental ends and will interfere with an agency of the Government in the performance of its duties.

45. The granting of the relief prayed for herein would constitute an invasion of the powers of the legislative and executive branches of the Federal Government and further a usurpation of the authority vested exclusively in the Circuit Court of Appeals by the National Labor Relations Act.

Wherefore, defendants respectfully move this Honorable Court that complainant's motion for an injunction pendente lite be denied, that complainant's bill of complaint be dismissed, and that complainant's petition for a declaratory judgment, declaring its rights in the premises, be denied.

(Signed) Bennet F. Schauffler, Individually and as Regional Director for the Fifth Region. (Signed) Jacob Blum, Individually and as Regional Attorney for the Fifth Region. (S.) Robert B. Watts, Malcolm F. Halliday, Attorneys for Defendants.

Duly sworn to by Bennet F. Schauffler and Jacob Blum. Jurat omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

Defendants' Requested Findings of Fact and Conclusions of Law—Filed July 14, 1937

The Court having considered all the pleadings filed in this case and after hearing argument of counsel makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Complainant, Newport News Shipbuilding and Dry Dock Company is a Corporation created and existing under the laws of the Commonwealth of Virginia and is engaged in designing, building and repairing naval and merchant vessels, having its plant at Newport News, Va.

2. The defendants, Bennet F. Schauffler and Jacob Blum, are Regional Director and Regional Attorney respectively, for the National Labor Relations Board in and for the Fifth Region.

3. A Trial Examiner of the National Labor Relations [fol. 67] Board designated, or to be designated by the National Labor Relations Board, also is a defendant.

4. The complainant is a respondent in a proceeding before the National Labor Relations Board under the National Labor Relations Act. A hearing has been scheduled on the allegations of a complaint issued by said Board against the complainant herein before a Trial Examiner of said Board in Newport News, Va. Complainant has filed a Bill of Complaint seeking an order of this Court enjoining the conducting of that hearing and further proceeding under the National Labor Relations Act.

5. The complainant is not threatened with or in danger of suffering any great irreparable or immediate injury cognizable in equity by the continuance of the proceeding pending before the National Labor Relations Board under the National Labor Relations Act.

6. Complainant has an adequate remedy under the provisions of the National Labor Relations Act.

Conclusions of Law

1. Whether or not the National Labor Relations Board has jurisdiction over complainant is a matter for the Board in the first instance to determine.

2. The complainant is not threatened with or in danger of suffering any great irreparable or immediate injury cognizable in equity by the continuance of the proceeding pending before the National Labor Relations Board under the National Labor Relations Act.

3. Complainant has an adequate remedy under the provisions of the National Labor Relations Act.

——, United States District Judge.

This is to certify that said Respondents presented to the Court the foregoing findings of fact and conclusions of law but the Court considering that the opinion rendered at the [fol. 68] conclusion of argument sets forth sufficiently its reasons for the decision reached, declined to make said findings as above set forth to which refusal respondents object and except.

Luther B. Way, United States District Judge.

July 14, 1937.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

In Equity. No. 401

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Complainant,

vs.

BENNET F. SCHAUFFLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board, et al., Defendants

OPINION OF THE COURT—Filed July 19, 1937

WAY, District Judge—from the Bench:

Gentlemen, I recognize the importance of this case to both complainant and the respondents, and ordinarily would expect to take the application under advisement and give more study and thought to the case before rendering a decision. In this instance, however, I have in the last few days read practically all of the decisions that have been cited, including the opinion of the Supreme Court in the Jones-Laughlin case. The Court desires to thank counsel for both sides for the excellent briefs of argument filed in advance of this hearing. I have found them very helpful in understanding the oral arguments. Under the circum-

stances, the Court ought to announce its conclusions now rather than postpone the decision until a later time, espe- [fol. 69] cially in view of the fact that the hearing has been postponed about two weeks on account of my physical inability to hear it earlier.

The case as presented stands on a motion to dismiss. Ordinarily, the effect of such a motion is to admit the truth of all the material and relevant allegations of the bill. That being true, strictly speaking, we have a case presented where the bill negatives the idea that the complainant is engaged in interstate commerce or in any activities which directly and substantially affect that type of commerce. However, I think it is clear nevertheless that the Court must pass on the question of its jurisdiction to hear and determine the controversy presented by the bill and determine whether or not it may grant the relief prayed for.

It is not clear to me how the Court can escape determining at the very beginning of this hearing whether or not it has jurisdiction to hear and determine the controversy presented. When I look at the Act I find nothing therein which of itself will solve that problem,—that is to say, the question of the Court's jurisdiction is not a question of law apparent on the face of the Act, but is a question of fact which must depend upon the adducing of evidence to establish or negative the existence of equity jurisdiction. It is elementary, I think, in such a situation that a judicial or quasi judicial body, unless the statute creating it otherwise provides, must in the first instance determine whether or not it has jurisdiction; that is to say, whether or not it has authority under the act of Congress or the act of the state legislature, as the case may be, to hear and determine the controversy presented. Before I read any of the applicable decisions, that point occurred to me, that as a part of our system of jurisprudence a body judicial or quasi judicial has the power, unless otherwise provided in the statute creating it, to determine in the first instance whether or not the case presented comes within its jurisdiction. I think that is the situation which we have here. As I construe the decision of the Supreme Court in the Jones-Laughlin Case, it is difficult to escape the conclusion that that is the view which the Supreme Court took of this particular statute. During the recess I have hastily

[fol. 70] re-examined some of the decisions and in that case the Court said this, with reference to this Act of Congress:

"Whether or not a particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We have got to inquire whether in the instant case the constitutional boundary has been passed."

That case was heard and passed upon by the Board and went up on appeal by the Board in regular course as contemplated by the statute. I construe that language gentlemen, as at least implying that where the question of jurisdiction is raised, it ought to be determined in the first instance by the Board itself rather than by some court, not expressly, or by implication, designated by the statute to determine that question for the Board.

There is other language in the decision, which I cannot put my hand on right now, that I think emphasizes the view that the question of jurisdiction, along with all other questions, is to be considered and determined first by the Board and later by the Circuit Court of Appeals, either when application is made by the Board to that Court to enforce its order or on appeal by a party who is aggrieved by the order of the Board.

I think, notwithstanding the very persuasive argument of counsel for complainant to the contrary, that not only are the authorities numerically speaking, with the respondents on the case presented, but that the weight of authority and reason is also with respondents. I have found some difficulty in following the reasoning of the First Circuit Court of Appeals in reaching the conclusion that the injunction ought to be sustained in the Bethlehem case. So I have little hesitation, gentlemen, in holding that not only is the respondent's motion to dismiss for want of jurisdiction, supported by the greater number of decisions, but that it is also supported by greater weight and reasoning.

In the oral arguments a great deal of stress has been [fol. 71] laid upon the damages which it is alleged will flow from the activities of the Board as a result of setting on foot and conducting the investigation which has been started; that as a result of such investigation the complain-

ant will suffer irreparable damage, particularly in respect of the heretofore uniformly friendly relations which it says have existed between it and its employees. I think that is a fact of which this Court might well take judicial notice, that during the many years which complainant has been in business in this vicinity, it has a record, so far at least as the public has known, remarkably clear of conflict between it and its employees. Nevertheless, if this complainant is engaged in interstate commerce, or if its activities so directly and substantially affect interstate commerce as to bring it within the purview of the act, it is difficult to see how its business and affairs can be, so to speak, set aside in a civil sanctuary where it is free from investigation by duly constituted national authority. Damages of that character, gentlemen, as I regard them, are more in the nature of damages for which there can be no recovery. I do not think, therefore, that the allegations of the bill and the affidavits with it establish a case of irreparable injury such as will justify the Court in issuing an injunction.

In that connection what was said by the Circuit Court of Appeals for the Seventh Circuit in the case of Beman against Cochrell et als., is applicable to the contentions of the complainant. There it was said:

"The contention is made in all of the cases that the employers are engaged solely in intrastate commerce and that, therefore, the Act either does not apply to them, or if it does it is unconstitutional. Conceding that such contentions are well founded, we think that an adequate forum has been provided by the terms of the Act for presentation and determination of these questions. That the parties may be subjected to expense, annoyance and inconvenience is no adequate reason for invoking the aid of equity, as expense, annoyance and inconvenience are present in some degree in all litigation; they are but incidental burdens of civilized government."

It seems to me that language applies to the case presented [fol. 72] by the bill. It may be that there will be burdens, annoyances, and at times harassing and oppressive action, but oppression and arbitrary conduct, if such ever occur, are not inherent in the provisions of the Act. Such action, if it ever occurs, will not result from the provisions of the

Act itself but as a result of the Act's being enforced by people who are not fit or proper persons to enforce it, not from defects in or arbitrary provisions of the Act itself. There cannot be found in its provisions anything that will justify this Court in concluding that in the enforcement of the Act the Board will impose unreasonable or unusual burdens or unnecessarily harass any defendant. If such things ever exist they will exist as the result of human frailty and human prejudice and not because of any arbitrary or unreasonable provisions in the Act of Congress, and the Court has no right to assume that any such action will be taken in any case.

It was also said by the Seventh Circuit Court of Appeals in the decision just referred to:

"A study of the Act, as well as the decisions of the various circuits referred to, convinces us that the Act itself affords an adequate and exclusive procedure for a consideration of all the questions here involved, without invoking the equitable jurisdiction of the Court. Our conclusion upon this point renders unnecessary the consideration of other questions."

It is the duty of the Court in approaching questions of this kind to try to meet them with an open mind, not influenced by the discussions that occur in the public press and on the hustings. I never read this Act of Congress until a few days ago. I am frank to say, gentlemen, that I was surprised to find that so much care has been exercised by the Congress in providing for review of the proceedings by the National Labor Relations Board. As I construe the Act, it makes every material ruling of the Board subject to review by the same Circuit Court of Appeals that will review the decision of this Court in this particular case in the event an appeal is taken herein. I think counsel would hesitate a long time to say that that Court will not give the most careful consideration to every petition which is presented to it by any party claiming to [fol. 73] have been aggrieved by an order of the Board.

Furthermore, a point that impresses me greatly is the fact that the Board is powerless to enforce any orders it makes without the aid of the Circuit Court of Appeals of the Circuit in which the case is pending, or if such Circuit Court of Appeals is in vacation, the District Court of the District in

which the complaint is pending. The Board itself must go to such Court to have its order enforced, and the Court has practically unlimited power to modify, set aside, or affirm the order as it may deem just and proper. Under such circumstances, gentlemen, I have very little hesitation in holding that the complainant has a plain, adequate and exclusive remedy under the terms of the Act itself, that no irreparable damage is threatened, and that this Court has no jurisdiction of the controversy presented by the bill.

Mr. Rumble: I assume, if your Honor please, that counsel for the respondents will immediately prepare and present a decree denying the relief prayed for and dismissing the bill. And on that assumption I wish to present in open court a petition for an appeal which is in the usual form. While the appeal is in the usual form, we go further and request: "This Court may award the petitioner a temporary restraining order enjoining and restraining defendants named in said bill and each of them, and their agents, servants and employees, from holding or causing to be held at any time pending said appeal, a hearing or investigation for the purpose of determining——

The Court: I think probably, Mr. Rumble, you are entitled to that type of relief, and I wonder if the respondents will object to postponing the proposed hearing for a week or so until you can make application to the Circuit Court or Judges for a restraining order. Mr. Halliday, you have been delayed mostly by reason of the Judge's illness and not by the action of the complainant; they were ready to go on with the hearing right away but had to wait for me to get back to court.

Mr. Halliday: Of course, I am speaking for myself, but [fol. 74] I know how I feel about it. I would oppose the granting of a stay pending appeal or the postponement of the hearing. I am speaking for myself, but I am pretty confident the Board will take that position. In the past, prior to the decision of the Supreme Court, I might, and the Board might, have taken a different attitude pending the decision of that Court but since the decision and since the Supreme Court has construed so many of these injunction cases, we feel so surely that the injunction procedure will not be successful.

Mr. Rumble: There is no question about the Court's power, notwithstanding you dismiss the bill, to grant a temporary restraining order pending the appeal, and we think that we are entitled to that relief.

The Court: I will grant a stay of a week or ten days so that you can present your petition for an injunction to the Circuit Court of Appeals or a Judge thereof.

Mr. Rumble: The appeal provided by Section 227 is an appeal to the Circuit Court of Appeals and my thought is the Court en bank would hear that appeal.

The Court: The request for a more extended restraining order should be presented to one of the Judges of the Circuit Court of Appeals or the Court itself.

Mr. Halliday: They have only one purpose. We have our own regular schedule of meetings.

The Court: Such extension would be merely to give them time to go to the Court of Appeals and apply for a more extended stay. It will not stay the proceedings of the Board until this case is heard on the merits by the Appellate Court, but it is to afford sufficient time for them to present their petition for injunction. That is as far as I will go. I will not grant a stay pending the appeal; that would, in effect, be giving complainant the relief which I have just denied.

Mr. Rumble: How would the record go up in the event you granted a stay for ten days or two weeks?

[fol. 75] The Court: Application would be made to a Circuit Judge or the Circuit Court of Appeals, as the case may be, for an injunction or restraining order, until that Court can hear the case on its merits. They are going to hold a short term, I am advised, in August; however, the Court may not convene again until October. For me to grant a stay for such length of time would be in effect, to deny in one breath the relief prayed for and then in the next breath grant it to you in a somewhat different form. I am willing to give you a breathing spell in this hot weather to present your application for an injunction to the Circuit Court of Appeals.

Mr. Rumble: Of course, it will be necessary for us to prepare our petition for appeal.

The Court: I will grant the appeal if you desire.

Mr. Rumble: As I have drawn the petition, you can stay the proceedings pending appeal.

The Court: I cannot give you that long a stay. I will give you a stay to and including the 22nd of July.

Mr. Skinner: Before your Honor closes your mind on that date, may I make one observation. I have just pointed out to Mr. Blum, who is the attorney who will conduct the hearing for the Trial Examiner, that this vessel that I have mentioned in my argument, the Yorktown, is away on her government trial. There are approximately 1100 ship yard employees on that vessel, some of whom we are bound to call as witnesses. Mr. Blum says he cannot try the case a week from now. If he cannot try the case a week from now, why go into the case at the present time, except I want to suggest to your Honor that no harm can come from giving us a ten days stay or a two weeks stay. The fact that this vessel was away on her trial trip was brought to the attention of the Regional Director by me.

Mr. Rumble: We have not any assurance that a Circuit Judge will be available in that period.

The Court: I think the complainant thoroughly under-[fol. 76] stands the case. The arguments have been most thorough.

Mr. Rumble: If you grant the stay to and including the 22nd, how much of a bond would you require.

The Court: Would there be any monetary damage, Mr. Blum?

Mr. Blum: There will not be any monetary damage to the Board but there will be to the discharged people, seven of them.

The Court: $1,000 bond.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

In Equity. No. 401

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Complainant,

v.

BENNET F. SCHAUFFLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; Jacob Blum, Individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; and The Trial Examiner of the National Labor Relations Board Designated or to be Designated by the National Labor Relations Board, Who is Now Unknown, Individually and as such Trial Examiner and as the National Labor Relations Board, Defendants

DECREE—Entered and Filed July 14, 1937

[fol. 77] This case having come on to be heard upon a motion of the complainant for an injunction pendente lite, upon a Bill of Complaint, and the exhibits therewith, the affidavit of J. B. Woodward, Jr., and upon defendants' motion to dismiss and opposition to the motion for injunction pendente lite, and argument of counsel and due consideration having been given, it is for the reasons stated by the Court in its opinion which is made a part of the record in this case hereby

Ordered That:

1. The motion for an injunction pendente lite, should be and hereby is denied.

2. The application for a declaratory judgment should be and hereby is denied.

3. Defendants' motion to dismiss should be and hereby is granted.

4. The Bill of Complaint should be and hereby is dismissed.

Luther B. Way, United States District Judge.

Dated July 14, 1937.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 14, 1937

[fol. 78] To the Honorable Judges of the District Court of the United States for the Eastern District of Virginia:

The petition of Newport News Shipbuilding and Dry Dock Company, a corporation chartered and existing under the laws of the State of Virginia, respectfully represents that it is aggrieved by the final decree entered in the above entitled cause by the District Court of the United States for the Eastern District of Virginia, at Norfolk on the 14th day of July, 1937, denying to petitioner a preliminary injunction as prayed in its bill and dismissing said bill; and petitioner assigns the following errors:

1. The Court erred in holding that as a Federal Court of Equity it was and is without jurisdiction of said cause.

2. The Court erred in holding that the National Labor Relations Board has exclusive jurisdiction to decide in the first instance the question whether petitioner (complainant in said suit) is subject to the jurisdiction of said board.

3. The Court erred in holding that petitioner (complainant in said suit) has a plain, adequate and complete remedy at law.

4. The Court erred in failing to hold that petitioner (complainant in said suit) is not subject to the jurisdiction of the said National Labor Relations Board.

5. The Court erred in denying to petitioner (complainant [fol. 79] in said suit) a preliminary injunction and in dismissing petitioner's bill.

Wherefore, for these and for other errors apparent on the face of the record, your petitioner prays that an appeal may be allowed, and it hereby appeals from the whole of the aforesaid decree to the United States Circuit Court of Appeals for the Fourth Circuit, and prays that the same together with a transcript of the record in said cause may be sent to said court for filing, and that said court will proceed to hear said cause; that the said decree be reversed and peti-

tioner awarded a preliminary injunction and said injunction made permanent upon final hearing as prayed in its bill and that pending the said appeal this court may award to petitioner a temporary restraining order enjoining and restraining the defendants named in said bill and each of them and each of their agents, assistants, servants and employees from holding or causing to be held at any time pending said appeal a hearing or investigation for the purpose of determining whether or not petitioner has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever with respect thereto; and that your petitioner may have such other, further and general relief as in law and justice it may be entitled to receive and to equity may seem meet.

Newport News Shipbuilding and Dry Dock Company, by Fred H. Skinner, Its Counsel. Skinner & Marshall. John Marshall. H. H. Rumble.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL

Plaintiff, Newport News Shipbuilding and Dry Dock Company having this day filed in open court its petition for an appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the final decree this day entered in this cause, and the Court, having duly considered the same, doth allow said appeal and doth fix the amount of the appeal bond at $1000.

And plaintiff, in its said petition, having prayed for a temporary restraining order pending the said appeal, and the Court, being of the opinion that the plaintiff is not entitled to such restraining order except an order staying said proceedings until July 23, 1937, in order to allow said complainant time to make an application to the Circuit Court of [fol. 81] Appeals or a Judge thereof, for a restraining order, doth Adjudge, Order and Decree that the defendant Bennet F. Schauffler, individually and as Regional Director

for the 5th Region of the National Labor Relations Board, and defendant, Jacob Blum, individually and as Regional Attorney for the 5th Region of the National Labor Relations Board, and each of them, and each of their agents, assistants, servants and employees, be and they are hereby restrained and enjoined from holding or causing to be held at any time prior to July 23, 1937, a hearing or investigation for the purpose of determining whether or not the said plaintiff has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act and from having any proceedings or taking any action whatsoever with respect thereto, but before this temporary restraining order shall take effect the plaintiff, or someone for it, shall execute before the Clerk of this Court bond with approved security in the penalty of One Thousand Dollars ($1000), conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby. It is further ordered that complainant shall give to counsel for the respondents at least 24 hours notice of the time and place of its said application to the Circuit Court of Appeals or a Judge thereof, for a restraining order.

Luther B. Way, United States District Judge.

A True Copy. Teste:
Paul W. Kear, Clerk, by Wm. P. Boehmer, Deputy Clerk.

Norfolk, Virginia, July 14, 1937.

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Equity. No. 4222

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Appellant,

versus

BENNET F. SCHAUFFLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; Jacob Blum, Individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; and The Trial Examiner of the National Labor Relations Board Designated or to be Designated by the National Labor Relations Board, Who is Now Unknown, Individually and as such Trial Examiner and as the National Labor Relations Board, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

DOCKET ENTRIES

July 21, 1937, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bonds (2), and citation are certified up under Section 7 of Rule 14.

Same day, the appearance of Fred H. Skinner and H. H. Rumble is entered for the appellant.

[fol. 84] July 23, 1937, the appearance of Charles Fahy, General Counsel; Robert B. Watts, Associate General Counsel; and Malcolm F. Halliday, Attorney, National Labor Relations Board, is entered for the appellees.

July 24, 1937, twenty-five copies of the printed record are filed.

July 27, 1937, original citation as to Trial Examiner is certified up under section 7 of Rule 14.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF APPELLANT FOR INJUNCTION PENDENTE LITE—
Filed July 29, 1937

Now comes Newport News Shipbuilding and Dry Dock Company, appellant in the above entitled cause, and moves this Honorable Court for an injunction or restraining order enjoining and restraining the appellees above named and each of them and each of their agents, assistants, servants and employees from holding or causing to be held at any time before the final disposition of this cause, a hearing or investigation for the purpose of determining whether or not the said appellant has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act and from having any proceedings or from taking any action with respect thereto.

The facts on which said motion is made are briefly as follows:

On June 21, 1937, the appellees, purporting to proceed under the act known as the National Labor Relations Act, and purporting to act on behalf of National Labor Relations Board, served notice upon appellant to the effect that a charge had been filed with said National Labor Relations Board that appellant has engaged or is engaging in unfair labor practices affecting commerce and requiring appellant to file its answer to said complaint on or before June 29th, 1937. Appellant is not engaged in commerce within [fol. 85] the meaning of the National Labor Relations Act, is not subject to the jurisdiction of the National Labor Relations Board, and the holding of such hearing will cause irreparable injury and damage to appellant, for which appellant has no adequate remedy at law. After due notice to the appellees, appellant filed in the District Court of the United States for the Eastern District of Virginia its bill praying for an injunction restraining the appellees and National Labor Relations Board from conducting the proposed hearing and served notice upon appellees that it would on a day named move the said Court for a temporary restraining order and injunction. The said Court having heard the said matter denied the appellant's motion for an injunction and dismissed its bill and from its final decree in said cause appellant appealed to this Court. The

facts herein stated are set forth in greater detail in appellant's bill shown in the record in this cause.

The objects of the motion are to restrain and enjoin the appellees above named, their agents, assistants, servants and employees from proceeding with said hearing.

Newport News Shipbuilding and Dry Dock Company, Appellant, by F. *S.* Skinner, H. H. Rumble, of Its Counsel.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTICE OF MOTION FOR INJUNCTION—Filed July 31, 1937

To the Appellees in the above entitled cause:

You will please take notice that pursuant to the agreement between your counsel and counsel for the appellant, appellant will, at 10 o'clock A. M., on August 2nd, 1937, move the Circuit Court of Appeals for the Fourth Circuit at its Courtroom in Asheville, North Carolina, for an injunction pendente lite in said cause, to continue until the final determi-
[fol. 86] nation of said cause, enjoining and restraining appellees and each of them and each of their agents, assistants, servants and employees from holding or causing to be held at any time before final disposition of this cause, a hearing or investigation for the purpose of determining whether or not the said appellant has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act and from having any proceedings or from taking any action with respect thereto.

Newport News Shipbuilding and Dry Dock Company, by F. H. Skinner, H. H. Rumble, of Its Counsel.

Due and legal service of the foregoing notice accepted and acknowledged this 29th day of July, 1937.

Robert B. Watts, Attorney for Appellees.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT OF CAUSE

August 2, 1937, (June term, 1937) cause came on to be heard on the motion of the appellant for injunction pendente lite, and on the merits, before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4222

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Appellant,

versus

BENNET F. SCHAUFFLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; Jacob Blum, Individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; and The Trial Examiner of the National Labor Relations Board Designated or to be Designated by the National Labor Relations Board, Who is Now Unknown, Individually and as such Trial Examiner and as the National Labor Relations Board, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued August 2, 1937. Decided August 2, 1937)

Before Parker, Northcott and Soper, Circuit Judges

[fol. 88] Fred H. Skinner and H. H. Rumble (John Marshall on brief) for Appellant, and Malcolm F. Halliday, Attorney, National Labor Relations Board, for Appellees.

OPINION—Filed August 2, 1937

Per CURIAM:

This is an appeal from a decree denying an application for a preliminary injunction and dismissing a bill of complaint which asked that the appellees be enjoined from proceeding to hear and pass upon a complaint filed with the Board charging the Newport News Shipbuilding and Dry Dock Company with violations of the National Labor Relations Act. Upon motion made before this Court for a restraining order pending appeal, the merits of the appeal have been fully argued and the cause submitted for final determination as to the correctness of the decree appealed from. Without expressing any opinion whatever on any aspect of the controversy pending before the Board, we are of opinion that the action of the court below was correct. Plaintiff has an adequate remedy under the statute and may not apply for relief in equity until it has exhausted the administrative remedy there provided. The matter has been so fully considered in other circuits as not to require further discussion. See particularly Pratt v. Oberman & Co. (C. C. A. 8th) 89 Fed. (2d) 786; Beman v. Bendix Products Corp. (C. C. A. 7th) 89 Fed. (2d) 661; Clark v. Lindemann & Hoverson Co. (C. C. A. 7th) 88 Fed. (2d) 59; Eliott v. El Paso Electric Co. (C. C. A. 5th) 88 Fed. (2d) 505; Heller Bros. Co. v. Lind (App. D. C.) 86 Fed. (2d) 862; E. I. Dupont De Nemours & Co. v. Boland (C. C. A. 2d) 85 Fed. (2d) 12; Precision Castings Co. v. Boland (C. C. A. 2d) 85 Fed. (2d) 12; Alexander Smith & Sons Carpet Co. v. Herrick (C. C. A. 2d) 85 Fed. (2d) 16; Bradley Lumber Co. v. National Labor Relations Board (C. C. A. 5th) 84 Fed. (2d) 97. Contra Myers v. Bethlehem Shipbuilding Corp. (C. C. A. 1st) 88 Fed. (2d) 154, 156.

The application for restraining order pending appeal will be denied and the decree dismissing the bill of complaint will be affirmed.

Affirmed.

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 4222

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, Appellant,

versus

BENNET F. SCHAUFFLER, Individually and as Regional Director for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; Jacob Blum, Individually and as Regional Attorney for the 5th Region, National Labor Relations Board, and as the National Labor Relations Board; and The Trial Examiner of the National Labor Relations Board Designated or to be Designated by the National Labor Relations Board, Who is Now Unknown, Individually and as such Trial Examiner and as the National Labor Relations Board, Appellees

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

DECREE—Filed and Entered August 2, 1937

This Cause came on to be heard on the motion of the appellant for an injunction pendente lite, to continue until the final determination of said cause, enjoining and restraining appellees and each of them and each of their agents, assistants, servants and employees from holding or causing to be held at any time before final disposition of this cause, a hearing or investigation for the purpose of determining whether or not the said appellant has en-
[fol. 90] gaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act and from having any proceedings or from taking any action with respect thereto, and on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the motion for an

injunction pendente lite be, and the same is hereby, denied, and

It is Further Ordered, Adjudged and Decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Senior Circuit Judge.

August 2nd, 1937.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for hearing immediately following Nos. 181 and 182.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,786. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 305. Newport News Shipbuilding and Dry Dock Company, petitioner, vs. Bennett F. Schauffler, Individually and as Regional Director for the 5th Region, National Labor Relations Board, et al. Petition for a writ of certiorari and exhibit thereto. Filed August 11, 1937. Term No. 305, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S
FILED
AUG 11 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 305

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board,

JACOB BLUM,
individually and as Regional Attorney for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.....

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board,

JACOB BLUM,
individually and as Regional Attorney for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Newport News Shipbuilding and Dry Dock Company, a corporation organized and existing under

the laws of the State of Virginia, prays that a writ of certiorari issue to review a decree of the United States Circuit Court of Appeals for the Fourth Circuit, affirming a decree of the United States District Court for the Eastern District of Virginia, refusing to grant to petitioner an injunction restraining respondents *pendente lite* from conducting a hearing and take other proceedings in relation to petitioner purporting to be had under the National Labor Relations Act; sustaining respondents' (defendants') motion to dismiss petitioner's bill; and dismissing said bill.

Opinions Below

The opinions below have not been reported.

That of the District Court appears in the record at page 68. That of the Circuit Court of Appeals appears in the record at page 87.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on August 2, 1937.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether a particular industry or concern which is not engaged in commerce, or in a business affecting commerce, within the meaning of the National Labor Relations Act, and is therefore not subject to the jurisdiction of the National Labor Relations Board, must submit to investigation by that Board, in other words,

Whether such an industry, although immune from the regulatory powers of the National Labor Relations Board, is, nevertheless, subject to the inquisitorial powers of that Board.

(2) Whether the National Labor Relations Board, has *exclusive* jurisdiction to determine, in the first instance, the question whether a particular industry or business is subject to its authority and powers of inquisition.

(3) Can said Board, by serving a formal complaint and notice, upon a concern which is not engaged in commerce, or in a business affecting commerce, within the meaning of said Act, acquire jurisdiction over such concern, and thus enlarge the powers of said Board?

Statute Involved

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 et seq.) and certain rules and regulations promulgated by the Board purporting to have been made pursuant to said Act, appear in the record (pamphlet following R. p. 30).

Statement

Petitioner owns and operates a single shipbuilding plant, located at Newport News, Virginia. It designs, builds and repairs ships. This is always done under a special contract previously made in each case. Its chief business is the building of vessels for the United States Navy. Of its total business in 1936, 91.4% was shipbuilding confined solely to Naval Vessels, 5.8% was repair work, 2.8% consisted of hydraulic turbine

construction. No merchant vessels were built at petitioner's plant between June, 1934, and January, 1937. (R. 7). Vessels built for the United States Navy are delivered at the Norfolk Navy Yard, Norfolk, Virginia. All other vessels, either built or repaired, are delivered at petitioner's plant at Newport News, Virginia. Petitioner has not now, and has never had, anything to do with the manning or operation of any vessels built or repaired by it. It is not now, and has never been, engaged in commerce or in business affecting commerce within the meaning of the National Labor Relations Act. (R. 8). Petitioner employs approximately 7,500 men (R. 6). The relations between petitioner and its employees are entirely harmonious and no labor dispute exists between them. Since 1927 there has existed among petitioner's employees an organization created and controlled by themselves, known as the plan of "Representation of Employees". Petitioner does not contribute toward the expenses or funds of said organization and has at no time dominated, influenced or controlled said organization or attempted so to do. (R. 18, 10). On June 4, ~~1927~~, on JUN 4 Philip H. Van Gelder, Secretary-Treasurer, Industrial Union of Marine and Shipbuilding Workers of America, of 2332 Broadway, Camden, N. J., filed with the National Labor Relations Board a paper entitled a "charge", in which he alleged that petitioner is engaged in certain unfair labor practices affecting commerce. (R. 28).

Thereupon, on June 18, 1937, the National Labor Relations Board, issued, and on June 21, 1937 caused to be served upon petitioner a formal complaint, together with notice that a hearing thereon would be held in Newport News, Virginia, on July 8, 1937.

(R. 24). On the 29th day of June, 1937, petitioner caused to be served upon respondents Schauffler and Blum a copy of its bill of complaint, together with notice to the effect that at 10 o'clock A. M., on July 6, 1937, petitioner would move the District Court of the United States for the Eastern District of Virginia, for an injunction *pendente lite,* enjoining and restraining said respondents, their agents, etc., from proceeding with said proposed hearing. (R. 37). Petitioner's said bill alleged the facts hereinabove set out and other facts showing that petitioner is not engaged in commerce, or in a business affecting commerce, and showing that the proposed hearing would cause irreparable injury for which petitioner has no adequate remedy at law. For sufficient reasons the said application for a preliminary injunction was continued until July 14, 1937. On that day defendant Schauffler, as Regional Director of the National Labor Relations Board for the 5th Region, Jacob Blum, as Regional Attorney for said Board for said Region and the Trial Examiner for the National Labor Relations Board, designated or to be designated by the National Labor Relations Board, to conduct said hearing, appeared generally in the said suit in equity in the District Court of the United States for the Eastern District of Virginia, and filed a motion to dismiss petitioner's bill therein (R. 47), and also filed what they styled "Opposition of Defendants to Motion for Injunction *Pendente Lite*".

On that day the cause was heard by said District Court on said motion to dismiss the bill, and said Court held that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, the question whether petitioner is subject to its jurisdiction and authority. (Opinion District Court

R. 68) and dismissed the bill (Decree R. 76). From this decree petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit (petition for appeal and assignment of errors, R. 77).

The said appeal was heard at Asheville, North Carolina, on August 2, 1937, and the decree of the Court below affirmed. (Per curiam Opinion R. 87. Decree R. 89).

Counsel for petitioner immediately applied for a temporary stay of the proposed hearing by said National Labor Relations Board, which was then set for August 5, 1937, to allow time to prepare and file a petition for certiorari and apply to one of the Justices of this Honorable Court for a temporary injunction enjoining respondents from proceeding with said hearing until the Court should have passed upon the granting of the writ of certiorari herein prayed.

The Court was disposed to grant said stay, but suggested to counsel that the said hearing be stayed by agreement. Thereupon counsel for respondent stated to the Court that he was unwilling to continue said hearing, but would consent to a continuance of one week, and would be guided by the suggestions of the Court. Thereupon the Court suggested that said hearing be continued for two weeks from August 5, 1937, and this was accordingly done by agreement.

There is now pending in this Court an application for writs of certiorari to the Circuit Court of Appeals for the First Circuit in the case of "Howard A. Myers individually and as acting Regional Director for the First Region, National Labor Relations Board et al v. Bethlehem Shipbuilding Corporation, Ltd., and Howard A. Myers, Edmund J. Blake, and Daniel M.

Lyons, individually and as the National Labor Relations Board v. Charles MacKenzie individually, etc., et al, Nos. 181 and 182." The Bethlehem case is in all of its material aspects precisely like the case presented in the record accompanying this petition.

And, whatever may be the general similarity of the pleadings in the several cases cited by the Circuit Court of Appeals in its opinion, this is the only case which is like the Bethlehem case in its facts.

Specifications of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In holding that whether petitioner is or is not subject to the jurisdiction of the National Labor Relations Board, it must exhaust the so-called administrative remedy provided by the National Labor Relations Act.

2. In holding that although petitioner may not be subject to the jurisdiction of the National Labor Relations Board, it must nevertheless submit to investigation by that Board.

3. In holding that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, whether a particular industry or concern is subject to its jurisdiction and authority.

4. In holding that an industry or concern which is not engaged in commerce or in a business affecting commerce, when served with a complaint by the National Labor Relations Board, may not challenge the action of said Board by a suit in equity to enjoin the same, but must exhaust its so-called administrative remedies provided by said Act.

5. In failing to hold that on the facts alleged in petitioner's bill, and admitted by the motion to dismiss, petitioner is not engaged in commerce or in a business affecting commerce within the meaning of the National Labor Relations Act, and not subject to the jurisdiction of the National Labor Relations Board, and therefore immune from its inquisitorial powers.

6. In failing to hold that upon the facts alleged in petitioner's bill and admitted on the motion to dismiss, the National Labor Relations Board has no function whatever to perform with respect to petitioner.

7. In affirming the decree of the District Court.

Reasons for Granting the Writ

(1) The decision and decree of the Circuit Court of Appeals for the Fourth Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Myers et al* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 88 Fed. (2) 154, Rehearing denied 89 Fed. (2) 1000. The facts in that case and the questions of law involved are substantially identical with the facts and questions of law involved in this case. The application for a rehearing in the Bethlehem case was made and denied subsequent to the decision of this Court in the Jones and Laughlin group of cases decided April 12, 1937.

(2) The decree of the Circuit Court of Appeals decides an important federal question in a way probably in conflict with applicable decisions of this Court. See supporting brief.

(3) The question presented is one of great public importance.

(4) In the case of Bethlehem Shipbuilding Corporation, Ltd. v. Myers, etc., referred to above, an application for writs of certiorari has been filed on behalf of the National Labor Relations Board in the Clerk's Office of this Court, Nos. 181 and 182. Should writs be granted in that case on the application of the representatives of the National Labor Relations Board, the propriety of granting a writ in this case, which in all substantial respects is identical with that, becomes obvious. The two cases may then be conveniently heard together.

Conclusion

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the Circuit Court of Appeals for the Fourth Circuit should be granted; that a temporary injunction should be awarded petitioner by one of the Justices of this Court enjoining the respondents, their agents, etc. from proceeding with said proposed hearing at any time before this Court shall have acted upon this petition; and that if said petition shall be granted, a further restraining order or temporary injunction should be awarded by this Court, enjoining respondents from proceeding with said hearing at any time prior to the final disposition of this cause.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,

By FRED H. SKINNER,
and
H. H. RUMBLE,
Of its Attorneys.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinions below have not been reported. Both appear in the record; that of the District Court, at page 68; that of the Circuit Court of Appeals, at page 87.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on August 2, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement

A summary and short statement of the facts and a statement of the errors relied on will be found in the petition, pages 3-8, *supra*.

ARGUMENT

I.

The National Labor Relations Act Has No Application To Petitioner.

In the Jones and Laughlin group of cases decided April 12th, 1937, this Court upheld the constitutionality of the National Labor Relations Act, but limited its scope to its only constitutional basis, namely the commerce clause of the constitution. The Court was careful to point out that the Act, by its terms, has no application to any concern which is not engaged in commerce, or in a business affeting commerce within the definitions contained in the Act.

As shown in the foregoing statement petitioner is not so engaged.

II.

The National Labor Relations Board Has No Jurisdiction of Petitioner.

Since as this Court held in the Jones and Laughlin group of cases that the Act "limits the jurisdiction of the Board to instances which fall within the commerce power", the Board has no jurisdiction of petitioner, and no function whatever to perform with respect to it.

Not being subject to the regulatory powers of the Board, petitioner is immune from its inquisitorial powers. The Board cannot enlarge its powers by serving a formal complaint and notice upon petitioner.

Ellis v. *Interstate Commerce Commission,* 237 U. S. 434, cited and followed in *United States ex rel Chicago, New York and Boston Refrigerator Company* v. *Interstate Commerce Commission,* 265 U. S. 292.

Also cited in *United States* v. *Pennsylvania Railroad Company,* 242 U. S. 208.

In the latter case it is said that the Armour Car Lines, which was held in the Ellis case, *supra,* not to be engaged in commerce, and hence not subject to regulation by the Commission, "had *immunity* from investigation". (Italics supplied).

See also *Jones* v. *Securities Commission,* 298 U. S. 1.

Under the decision of the Circuit Court of Appeals in the instant case there is no conceivable business that is immune from investigation by the National Labor Relations Board, should that Board see fit to serve it with a complaint and notice of hearing. It would have to exhaust the so-called administrative

remedies provided by the Act, which means going through with the investigation.

In the case of Bethlehem Shipbuilding Corporation, Ltd. v. Myers et al, in which the material facts are substantially the same as in this case, the District Court of Massachusetts granted a temporary injunction, enjoining the proposed hearing by the Board. (15 Fed. Supp. 915). On appeal to the Circuit Court of Appeals for the First Circuit the decree of the District Court was affirmed. (88 Fed. (2), 154).

Following the decision of the Supreme Court in the Jones & Laughlin and allied cases the National Labor Relations Board moved the Circuit Court of Appeals for leave to file a petition for a rehearing in the Bethlehem case. On this motion for a rehearing the Circuit Court of Appeals (May 13, 1937), 89 Fed. (2) 1000, distinguished the Jones & Laughlin and allied cases, denied the motion and said:

> "The appellants (National Labor Relations Board) . . . . urge that our decision in these cases is in conflict with that of the Supreme Court in National Labor Relations Board v. Jones & Laughlin Steel Corporation and allied cases . . . . It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate business involved in" the allied cases . . . .
>
> "When the question is raised, as in this case, we think *it devolves on the National Labor Relations Board to show* that *the business* involved *is probably within its jurisdiction.* On the findings of the District Judge that fact is not established in the present case. We think

the case should stand for final hearing in the District Court." (Italics ours.)

As stated in the accompanying petition, a petition for writs of certiorari to the judgment and decrees of the Circuit Court of Appeals in that case has been filed and is now pending. If writs should be granted in that case, the justice and propriety of granting a writ in this case is obvious; for while a decision in that case would settle the public question involved, it would afford no relief to petitioner in this case.

III.

Petitioner Has the Right to Challenge the Proposed Action of the Board.

The bill in this case alleges that the proposed hearing by the National Labor Relations Board will, by requiring the attendance of its officers and employees, disorganize its business, interrupt the peaceful relations existing between petitioner and its employees, delay the completion of Naval vessels now under construction for the Government of the United States, thereby making petitioner liable for heavy demurrage, and otherwise work irreparable injury and damages, for which petitioner has no adequate remedy at law.

In *Washington, etc. Coach Co.* v. *National Labor Relations Board,* decided with the Jones and Laughlin case, Mr. Justice Roberts said:

> "As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action."

It is respectfully submitted that this right of challenge is a right to challenge any proposed action by the Board not authorized by the statute; that the time to challenge it is before the mischief is done, the place, in the proper United States District Court, and the appropriate method, a bill in equity to enjoin such unauthorized proceedings.

This is the course followed by petitioner in this case, and, we submit, was and is the only feasible and proper method of challenging the action and authority of the Board when it proposes to pass beyond the bounds of its legitimate jurisdiction and authority.

Very respectfully submitted,

FRED H. SKINNER,
H. H. RUMBLE,
JOHN MARSHALL,
Attorneys for the Petitioner.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 305.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner,*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board.

JACOB BLUM,
individually and as Regional Attorney for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER

FRED H. SKINNER,
H. H. RUMBLE,
Solicitors for the Petitioner.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 305.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner,*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board.

JACOB BLUM,
individually and as Regional Attorney for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court has not been reported. That of the Circuit Court of Appeals is reported in 91 Fed. (2), 730. Both appear in the

record; that of the District Court at p. 88 et seq., that of the Circuit Court of Appeals at p. 104.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on August 2, 1937. (R. 105).

The petition for a writ of certiorari was filed on August 11, 1937, and granted on October 11, 1937.

The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925. The bill in the District Court presented a controversy arising under the constitution and laws of the United States and alleged that the matters and interests in controversy exceed the sum or value of $3,000.00, exclusive of interest and costs (Art. 29, R. 18) and also alleged facts supporting these allegations, all of which were admitted by Respondents' motion to dismiss the bill (R. 70).

Statute Involved

The National Labor Relations Act (Act of July 5, 1935, c. 375, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 et seq.) and certain rules and regulations promulgated by the Board purporting to have been made pursuant to said Act, appear in the record. (R. 27 et seq.)

STATEMENT OF THE CASE

The facts alleged in the bill and admitted on the motion to dismiss, are given below. The abbreviation "Art." used in the following statement refers to Articles of the bill.

Facts

Petitioner is a corporation organized and existing under the laws of the State of Virginia, and owns and operates a single, complete and independent shipyard located at Newport News, Virginia. (Art. 1, R. 1). It there designs and builds ships under specific contracts previously made in each case. Incidental to its principal business of designing and building ships, it has built certain machine products, such as hydraulic or water turbines, and repairs such vessels as are sent or come to it for the purpose of having repairs made, all such work being performed as in the case of its shipbuilding business, only under specific contracts therefor. (Art. 7, R. 5).

Petitioner fabricates substantially all materials used in doing the work herein described, and, for the most part, builds the machinery for each ship built by it. The cost of the materials so used by it in its shipbuilding business and in the hydraulic work so done by it represents less than one-half the entire cost of the work and the cost of materials used in the ship repair work represents only a small fraction of the cost of performing such repairs. (Art. 8, R. 5).

All said ships when built or repaired are delivered to the owners thereof at petitioner's shipyard, Newport News, Virginia, except that vessels built for the United States Navy are delivered at the United States Navy Yard, Norfolk, Virginia. (Art. 8, R. 5). When the completed vessels leave the shipyard they leave "light," that is, no cargo is put aboard or carried away, and Petitioner's connection therewith is thereupon terminated. (Exhibit D, par. 3, R. 63). Petitioner

does not engage, or cause any such vessel to be placed or engaged, in commerce of any kind. (Art. 12, R. 7). In each case of a merchant vessel the master recruits and signs on his crew. Petitioner has not now and has never had anything to do with the manning or operation of any vessels built or repaired by it. (Exhibit D, par. 3, R. 63). It is not now and has never been, nor are its employees, engaged in commerce or in business affecting commerce. (Art. 24, R. 17).

Petitioner did no merchant shipbuilding between June, 1934, and January, 1937. Of its total business in 1936, 91.4% was shipbuilding confined solely to vessels for the United States Navy, 5.8% was repair work and 2.8% consisted of hydraulic turbine construction.

When the bill was filed, petitioner was building six (6) men of war vessels for the United States Navy (63,920 tons) and three (3) small merchant harbor craft aggregating 2,264 gross tons. (Art. 19, R. 14).* The time required to build such vessels ranges from 30 to 32 months in the case of destroyers and 36 months or more in the case of cruisers and air craft carriers. (Exhibit D, par. 4, R. 63).

In 1936, Petitioner employed only 8/100 of 1% of the steel plates, shapes and bars produced in the United States in that year and such materials constitute by far the larger part of all materials used in

*Since the bill was filed one of the three naval vessels and two of the merchant vessels mentioned above have been completed and delivered.

the shipbuilding business. (Exhibit D, par. 5, R. 63). Petitioner pays annual local taxes on the materials employed in its business. (Exhibit D, par. 6, R. 64).

When the bill was filed, Petitioner employed approximately 7500 employees.* (Art. 7, R. 5). The relations between petitioner and its employees have always been and are now entirely harmonious. (Arts. 15 and 17, R. 11; 12). No labor dispute exists between them. (Exhibit C, R. 61). Allegations to the contrary in the charges brought against petitioner by the Board are erroneous.

Since 1927, there has existed among Petitioner's employees and now exists an organization created and controlled by themselves known as the "Plan of Representation of Employees in the Plant of the Newport News Shipbuilding and Dry Dock Company." (Art. 15, R. 11). Petitioner has not contributed and does not contribute towards the expenses or funds of said organization and has at no time dominated, influenced or controlled said organization or attempted so to do. (Art. 12, R. 7-8). As late as June 15, 1937, an election was held under the provisions of said Plan in which 90.8% of the employees participated, whereby, for the coming fiscal year the officers of the Plan were elected. (Art. 23, R. 16).

Notwithstanding said facts, on June 4, 1937, one Philip H. Van Gelder, Secretary-Treasurer, Industrial Union of Marine and Shipbuilding Workers of Amer-

*The number of employees has been substantially reduced since the filing of the bill.

ica, 2332 Broadway, Camden, New Jersey, filed with the National Labor Relations Board a paper entitled a "Charge" in which he alleged that the Petitioner is engaged in certain unfair labor practices affecting commerce in that between March 3, 1937, and June 1, 1937, Petitioner discharged and refused to reinstate four (4) of its employees "because they joined and assisted a labor organization of their own choosing and engaged in concerted activities with fellow employees for collective bargaining and other mutual aid and protection"; that Petitioner is dominating and interfering with the rights of its employees to self-organization by sponsoring, dominating, interfering with and lending financial support to the aforesaid plan of representation, all of which affects commerce within the meaning of said Act. (Art. 2, R. 2, and Exhibit B, R. 25). Thereupon the National Labor Relations Board issued and on June 21, 1937, caused to be served upon Petitioner a formal complaint, together with a notice of hearing thereon. (Art. 2, R. 2, and Exhibit A, R. 21). Thereupon, Petitioner brought this suit for a preliminary injunction *pendente lite* as hereinafter set out in greater detail.

The bill denies each and every of these allegations of the Board (Art. 12, R. 7) and alleges that this investigation by the Board was not instigated by the employees of Petitioner or by the above mentioned organization of Petitioner's employees known as the "Plan of Representation of Employees in the Plant of the Newport News Shipbuilding and Dry Dock Company," (Art. 11, R. 6-7), but by the hereinabove named union known as "Industrial Union of

Marine and Shipbuilding Workers of America" with headquarters at Camden, New Jersey, which is affiliated with the organization known as "Committee for Industrial Organization" or "C. I. O."; that said Industrial Union has no standing among the employees at petitioner's shipyard and that its sole aim and purpose in filing said charges with said Board is to force petitioner to cease dealing with its employees with respect to wages and other conditions of employment through said plan of representation and thus enable and assist it, the said Industrial Union, in organizing the employees at Petitioner's shipyard and thereby requiring them to join it, the said Industrial Union, if they wish to work for Petitioner. (Arts. 20 and 21, R. 15).

The bill asserts Petitioner's right to maintain harmonious relations with its employees and its right to deal with them in respect of rates of pay, wages, hours of employment and other working conditions in a manner mutually satisfactory to Petitioner and its employees; asserts that such right is of incalculable value to Petitioner in the successful conduct of its business and that it will suffer irreparable injury if that relationship is upset. (Art 17, R. 12).

Petitioner's said bill of complaint alleged the facts hereinabove set out and other facts showing that it is not engaged in commerce or in a business affecting commerce and showing that the proceedings would cause irreparable injury for which Petitioner has no adequate remedy at law.

The Proceedings Below

The defendants, Schauffler and Blum, Regional Director and Regional Attorney of the Board, respectively, and the Trial Examiner appeared generally in said suit and filed a motion to dismiss Petitioner's bill therein (R. 70) and also filed what they styled "Opposition of Defendants to Motion for Injunction Pendente Lite."

The cause was heard on the motion to dismiss the bill. The District Court held that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, the question whether Petitioner is subject to its jurisdiction and authority (R. 89); that Petitioner has a "plain adequate and exclusive remedy under the terms of the Act itself," and that because that remedy was supposed to be *exclusive,* the Court was without jurisdiction (R. 93); and accordingly dismissed the bill. (R. 96).

The Circuit Court of Appeals affirmed, (Opinion R. 104, Decree, R. 105) and this Court granted certiorari.*

Specification of Errors To Be Urged

Of the assigned errors the following are intended to be urged:

---

*Since the filing of the petition for a writ of certiorari, the trial examiner has held a hearing on the charges and complaint filed by the Board; but as yet has made no report to the Board. Under the Act. (Sec. 10 (c)) the Board may require a further hearing or hearings. Until the Board shall have acted, and the possible review by the Court shall have been had, the proceeding remains incomplete, and is a continuing menace. It was not alone from the holding of a hearing, but also from the action the Board might take thereon, and particularly with respect to disturbing the existing relations between Petitioner and its employees, that the damages anticipated, as alleged in the bill, were and are apprehended.

The Circuit Court of Appeals erred:

1. In holding that whether Petitioner is or is not subject to the jurisdiction of the National Labor Relations Board, it must exhaust the so-called administrative remedy provided by the National Labor Relations Act.

2. In holding that although Petitioner may not be subject to the jurisdiction of the National Labor Relations Board, it must nevertheless submit to investigation by that Board.

3. In holding that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, whether a particular industry or concern is subject to its jurisdiction and authority.

4. In holding that an industry or concern which is not engaged in commerce or in a business affecting commerce, when served with a complaint by the National Labor Relations Board, may not challenge the action of said Board by a suit in equity to enjoin the same, but must exhaust its so-called administrative remedies provided by said Act.

5. In failing to hold that on the facts alleged in Petitioner's bill, and admitted by the motion to dismiss, Petitioner is not engaged in commerce or in a business affecting commerce within the meaning of the National Labor Relations Act, and not subject to the jurisdiction of the National Labor Relations Board, and therefore immune from its inquisitorial powers.

6. In failing to hold that upon the facts alleged in Petitioner's bill and admitted on the motion to dis-

miss, the National Labor Relations Board has no function whatever to perform with respect to Petitioner.

7. In affirming the decree of the District Court.

Summary of Argument

This case was disposed of in the District Court on a motion to dismiss the bill. On the facts alleged in the bill and admitted by the motion to dismiss, Petitioner's business is a purely local industry whose activities do not directly or substantially affect interstate or foreign commerce and no labor dispute existed. This Court in the Jones and Laughlin group of cases held that the National Labor Relations Act purports to reach only what may be deemed to burden or obstruct such commerce; that the jurisdiction of the National Labor Relations Board is limited to those instances which fall within the commerce power, and that if the Board should exceed the jurisdiction conferred upon it, any person aggrieved may challenge its action. Under those decisions the business of Petitioner, as disclosed on the record, is not within the scope of said Act, and Petitioner and its relations to its employees are not subject to the jurisdiction of the National Labor Relations Board. Not being subject to the regulatory powers of the Board, Petitioner is immune from its inquisitorial powers. When the Board filed charges and issued a complaint against Petitioner it exceeded its jurisdiction. Petitioner thereupon challenged its action, as this Court said it had the right to do; and in the only appropriate method, namely, by a bill in equity for injunctive relief. The facts alleged in the bill and admitted on the motion

to dismiss amply show that Petitioner would, through the unwarranted action of said Board, suffer irreparable injury, for which it has no adequate remedy at law. The decree of the Circuit Court of Appeals should be reversed, and the cause remanded with instruction to direct the District Court to grant the injunction prayed, and hear the cause on the merits.

ARGUMENT

Introduction

This suit, challenging the jurisdiction of the National Labor Relations Board and praying for a preliminary injunction, was instituted by Petitioner in July, 1937, *after* the decisions by this Court in the Jones and Laughlin group of cases, 301 U. S. 1 et seq. Under the interpretation given the Act in those decisions, it seemed clear that Petitioner is not subject to the jurisdiction of the Board. Yet, singularly enough, the question of the power of the Board to regulate the business of Petitioner, which lies at the very threshold of any attempt by the Board to exercise such power, was not decided by either of the courts below.

A hearing was had in the District Court on the bill of complaint and affidavits filed therewith and the cause was disposed of on respondents' motion to dismiss the bill, on which, of course, the material allegations of the bill were admitted to be true.

The bill describes with considerable particularity the business conducted by Petitioner and avers (Art. 24, R. 17) that neither the transaction of its business nor its relations with its employees with re-

spect thereto constitute commerce among the several states or with foreign nations, nor do they directly affect such commerce, or burden the same or affect the free flow thereof, nor have they led or tended to lead to labor disputes affecting such commerce.

It is significant that in all of the seventeen grounds stated by respondents in their motion to dismiss the bill (R. 70), not one so much as suggests that the bill shows on its face that Petitioner is engaged in a business affecting commerce within the meaning of the Act, and hence subject to the jurisdiction of the Board.

Respondents proceeded throughout upon the theory that although Petitioner may be exempt from the regulatory powers of the Board, yet the latter, having preferred charges of unfair labor practices against it, questions of the Board's jurisdiction are for the exclusive determination of the Board in the hearing of these charges.

This view was accepted and applied by both of the courts below.

The District Court in its opinion (R. 89) said:

> "The case as presented stands on a motion to dismiss. Ordinarily, the effect of such a motion is to admit the truth of all the material and relevant allegations of the bill. That being true, strictly speaking, we have a case presented where the bill negatives the idea that the complainant is engaged in interstate commerce or in any activities which directly and substantially affect that type of commerce. However, I think it is clear nevertheless that the Court must pass on the question of its juris-

diction to hear and determine the controversy presented by the bill and determine whether or not it may grant the relief prayed for. * * *

"It is elementary, I think, in such a situation that a judicial or quasi judicial body, unless the statute creating it otherwise provides, must in the first instance determine whether or not it has jurisdiction; that is to say, whether or not it has authority under the act of Congress or the act of the state legislature, as the case may be, to hear and determine the controversy presented."

It is obvious that the learned District Judge here failed to distinguish between two widely different things:

(1) The undoubted right and duty of such a body to make a *preliminary* inquiry, before public action, for the purpose of informing itself whether a particular concern is subject to its authority; and

(2) Starting a *public* investigation of such concern, notwithstanding it is outside of Federal control; and, in that unauthorized proceeding, and to the exclusion of the courts, determining the question of its own jurisdiction and authority. See p. 33, *post*.

The *per curiam* opinion of the Circuit Court of Appeals is to the same effect, though somewhat more broadly expressed. Thus (R. 104):

"Without expressing any opinion whatever on any aspect of the controversy pending before the Board, we are of opinion that the action of the court below was correct. Plaintiff has an adequate remedy under the statute and may not apply for relief in equity until it has

exhausted the administrative remedy there provided."

This means that although the Petitioner (as admitted by the motion to dismiss) is not engaged in commerce or in a business affecting commerce within the meaning of the Act, yet the National Labor Relations Board having preferred charges of unfair labor practices against it, Petitioner was obliged to submit to be investigated by the Board, whatever the cost and injury involved. We do not so understand the law. So interpreted, the Act would apply without limitation to every business, however local. So interpreted, the Act would have no constitutional basis on which to rest.

This Court, in the Jones and Laughlin and allied cases, has said, in effect, that if the Act could be interpreted to apply to local industries whose activities do not directly and substantially affect commerce, it must fall; that the jurisdiction of the National Labor Relations Board does not extend to such industries; and that if that Board should undertake to transcend the limits of its jurisdiction, any person aggrieved may challenge its action.

Congress, if it had wished to do so, could not have conferred upon the Board jurisdiction to deal with such an industry. The want of jurisdiction is a want of power for any purpose. Such an industry is immune from molestation by the Board. It is beyond the reach of Congress, and the latter could not, if it would, subject it to vexatious and costly hearings on charges which the Board is without authority to make. The expense, the annoyance and damaging

effects of such proceedings cannot be treated as ordinary incidents of litigation of the kind to which every citizen may possibly be subjected.

The procedural provisions of the National Labor Relations Act have been approved by this Court as applied to those concerns which, by the terms of the Act, are subject to the jurisdiction of the Board. Congress could not make those proceedings applicable to a concern which is constitutionally beyond its reach; and has not attempted to do so.

I.

The National Labor Relations Act Has No Application to Peitioner.

On the facts alleged in the bill and admitted on the motion to dismiss Petitioner is not within the purview of the National Labor Relations Act. The bill alleged all of the facts set out in the foregoing statement of facts. The picture there presented is that of a local industry whose activities do not directly or substantially affect interstate or foreign commerce.

The relations between Petitioner and its employees were entirely harmonious. No labor dispute existed.

These facts would have been fully proved, but for the interposition of the motion to dismiss. On the motion to dismiss the District Court treated the allegations of the bill as admitted and said:

> "That being true, strictly speaking, we have a case presented where the bill negatives the idea that the complainant is engaged in interstate commerce or in any activities which di-

rectly and substantially affect that type of commerce." (R. 89).

Notwithstanding this view of the case presented by the bill, the District Court was of the opinion that the question of the jurisdiction of the National Labor Relations Board over Petitioner is for the exclusive determination of that Board in the hearing of the charges preferred by the Board.

That Court held that the Petitioner had "a plain, adequate and *exclusive* remedy under the terms of the Act itself" (Italics supplied); and that because that supposed remedy was *exclusive,* the Court was without jurisdiction of the cause. (R. 93).

This opinion and that of the Circuit Court of Appeals affirming the decree of dismissal (R. 104) pass completely over the question whether the Act itself has or *could* have any application to such an industry as is presented on this record.

This Court has said that the Act purports to reach only what may be deemed to burden or obstruct commerce as therein defined.

In the Jones and Laughlin case, 301 U. S., 1, the Act was challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns.

Of this contention and the argument used in support of it, the Chief Justice said;

> "If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the Federal power which inheres in

the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 549, 550, 554. The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system. Ibid. * * * * The cardinal principle of statutory construction is to save and not to destroy."

The question was whether in the light of this principle the Act could be so construed as to operate within the sphere of constitutional authority. The majority of the Court were of the opinion that it could. It was pointed out that the Act, by its terms, does not purport to reach all industries, but only such as may be deemed to burden or obstruct commerce within the definition of the term "affecting commerce," therein contained.

Of that definition the Chief Justice said:

"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industries regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplat-

ing the exercise of control within constitutional bounds."

It is recognized that the power of Congress over interstate commerce is plenary, and may be exerted to protect that commerce "no matter what the source of the dangers which threaten it."

It is also recognized that this power may extend to activities which, separately considered, are intrastate; provided they have such close and substantial relation to interstate commerce that their control becomes necessary to protect that commerce from burdens and obstructions. Of this power the Chief Justice said:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree."

The industry described in the record in this case is not only a local enterprise; but its activities do not burden or obstruct commerce in any degree. This is admitted by the motion to dismiss. As was said in the Schechter case, to find "immediacy or directness" here would be to find it "almost everywhere".

Should the decisions below stand, there is no conceivable business, however local, however innocent of any direct effect upon interstate commerce, that may not be subjected to costly and harrassing investigations

by the National Labor Relations Board; and that, under the supposed authority of an Act which this Court has said does not purport to apply to such a business. This Court has further said, if we correctly read its opinion, that if the Act could be interpreted to apply to such a business, it must fall by reason of the limitation upon the Federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment.

We think it clear that, if the Act, as a whole, does not apply and could not have been made to apply to a particular business, then no part of the Act can be applied to that business; and that its procedural features, the so-called administrative remedies, are for those whose business is of such a character as to subject them to Congressional control; and may not be applied to others *in invitum*.

Moreover, Petitioner is engaged solely in production. Production is not commerce. See cases cited, page 41, *post*. Petitioner's activities, admitted of record, are not within the scope of the Act.

II.

The National Labor Relations Board Has No Jurisdiction of Petitioner.

This would seem to follow as a necessary corollary to the proposition advanced under Point I above. The National Labor Relations Board is a creature of the National Labor Relations Act. Surely its reach does not extend beyond the constitutional limits of the Act itself. But resort to deduction is unnecessary. This

Court in the group of cases above discussed dealt specifically with the jurisdiction of the Board.

Thus in the Jones and Laughlin case the Chief Justice quoted Sec. 10 (a) of the Act.

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Sec. 8) affecting commerce."

and said:

> "The critical words of this provision, prescribing the limits of the Board's authority in dealing with labor practices are 'affecting commerce'."

Of the definition of the term "commerce" as contained in the Act he said:

> "There can be no question that the commerce thus contemplated by the Act (aside from that within a territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense."

And of the definition of the term "affecting commerce",

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

In *Washington V. & M. Coach Co. v. National Labor Relations Board,* 301 U. S., 142, Mr. Justice Roberts said:

> "As we have had occasion to point out in decisions rendered this day the Act limits the jurisdiction of the Board to instances which fall within the commerce power."

As thus limited the jurisdiction of the Board does not extend to the business of Petitioner as disclosed upon this record. The Board has no authority over Petitioner, and no function whatever to perform with respect to it.

Not being subject to the regulatory powers of the Board, Petitioner is immune from its inquisitorial powers. The Board cannot enlarge its powers by serving a complaint and notice upon Petitioner.

Ellis v. Interstate Commerce Commission, 237 U. S. 434.

In that case the Interstate Commerce Commission reciting that it appeared from a complaint on file that the allowances paid for the use of private cars, the practices governing the handling and icing of such cars, etc., on the part of carriers, subject to the act to regulate commerce, violated that act in various ways, ordered a proceeding to be instituted by the Commission to investigate such practices. It ordered that carriers by railroad subject to the act be made parties respondent and later that all persons and corporations owning or operating cars and other vehicles and instrumentalities of shipment or carriage of property in interstate commerce be made parties also. Among the

latter was the Armour Car Lines, a New Jersey corporation. That concern owned, manufactured and maintained refrigerating, tank, and box cars and let those cars to the railroads or shippers. It also owned and operated certain icing stations on various lines of railway and from these iced and re-iced cars when sent by railroads to the icing plant. It had no control over motive power or over movement of cars that it furnished.

The ground on which the petition against the Armour Car Lines was filed was stated to be that it became the duty of the Commission to ascertain whether Armour & Company, an Illinois corporation, was controlling Armour Car Lines, the New Jersey corporation, and using it as a device to obtain concessions from published rates of transportation, and whether Armour Car Lines was receiving for its refrigerating service unreasonable compensation that inured to the benefit of Armour & Company in violation of the act. In the proceeding thus ordered certain questions were put to the Vice-President of the Armour Car Lines which he declined to answer. The Commission applied to the District Court for an order requiring the witness to answer, the order was granted and an appeal was taken directly to this Court.

Here it was held that the Armour Car Lines was not engaged in interstate commerce, and not subject to regulation by the Commission unless it could be shown to be a mere tool of the Armour Company within the purview of section 15 of the Act to regulate commerce. This appears from the following extract from the opinion:

> "If the price paid to the Armour Car Lines was made the cover for a rebate to Armour & Company or if better cars were given to Armour & Company than to others, or if, in short, the act was violated, the railroads are responsible on proof of the fact. But the only relation that is subject to the Commission is that between the railroads and the shippers. It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor. It was argued that the Commission might look into the profits and losses of the Armour Car Lines (one of the matters inquired about) in order to avoid fixing allowances to it at a confiscatory rate. But the Commission fixes nothing as to the Armour Car Lines except under Sec. 15 in the event of which we shall speak."

Regarding the position of Armour Car Lines in the pending investigation, Mr. Justice Holmes, speaking for the Court, said:

> "The Armour Car Lines not being subject to regulation by the Commission, its position was simply that of a witness interested in but *a stranger to the inquiry,* and the Commission could *not enlarge its powers* by making the company a party to the proceedings and serving it with notice." (Italics ours).

Thus it is held that a concern which is not subject to the regulatory powers of the Commission is immune from its inquisitorial powers. Such was the view of the effect of the decision taken by this Court in the later case of *United States* v. *Pennsylvania Railroad*

Company, 242 U. S. 208. There the Court, speaking of the Ellis case, said:

> "The testimony sought by the Commission was to expose and prevent what were supposed to be discriminatory practices, and the right to require the testimony depended, it was the effect of the decision, upon the relation of the Armour Company to the Armour Car Lines through the railroad, and whether what was paid to the Armour Car Lines was in effect paid to the Armour Company and made a means of discrimination. This view was rejected and it was said: 'It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or a less price to their lessor,' —the lessor of that case being the Armour Car Lines; and, as it was not shown that it was merely the tool of the Armour Company, it had *immunity* from the investigation." (Italics supplied).

The Ellis case is also cited with approval in United States *ex rel Chicago, New York and Boston Refrigeration Company* v. *Interstate Commerce Commission*, 265 U. S. 292.

Applying here the doctrine of the Ellis case it is clear that a concern such as Petitioner, which is not subject to the regulatory powers of the National Labor Relations Board, is immune from its inquisitorial powers; and that the Board cannot enlarge its powers by preferring formal charges and serving notice of a hearing thereon.

The right of the aggrieved party to challenge its action is recognized by this Court. Mr. Justice Roberts

in the case of *Washington, etc. Coach Co.* v. *National Labor Relations Board, supra,* said:

> "As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action."

When the Board preferred charges of unfair labor practice against Petitioner and served notice of a hearing thereon, it exceeded its rightful jurisdiction. That was the time to challenge its action; and this the Petitioner did in the only appropriate method, when it sought by bill in equity to enjoin further action by the Board.

As we shall have occasion to urge later herein under the head of Irreparable Injury, there is no analogy between an ordinary suit by citizen against citizen, and a proceeding by the Federal Government to investigate the affairs of a private industry whose activities lie beyond Federal control. In such case the whole power and prestige of Government, with vast resources at its command, are brought to bear upon the citizen. If he submits, he enters an unequal contest, and may be crushed by the fact alone that he has become suspect by the Government and is being investigated for supposed infraction of the law.

It was to protect the citizen against such usurpation of power by the Federal Government, that the Tenth Amendment was adopted.

This Court has always been vigilant to protect the citizen against encroachment upon his constitutional rights by agencies of Government. The evils of unwarranted investigations by Governmental bureaus are recognized by the Court in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, where Mr. Justice Sutherland, speaking for the majority (pp. 24-25) said:

> "Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.'
>
> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. United States, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our

institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments — even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

III.

The Facts Alleged in the Bill and Admitted on the Motion to Dismiss Present a Case of Irreparable Injury Requiring Injunctive Relief.

Under Points I and II, we have shown that on the facts alleged in the bill and admitted by the motion to dismiss, Petitioner is not engaged in commerce or in a business affecting commerce within the meaning of the National Labor Relations Act. The District Court so treated the case and the question is no longer open.

On this record, therefore, Petitioner is not subject to the jurisdiction of the National Labor Relations Board. Any action by said Board involving expense, loss or damage to Petitioner is wholly unauthorized.

We propose here to show that on the admitted facts, Petitioner made out a case of irreparable injury requiring the intervention of a Court of Equity.

Among the damages apprehended, as alleged in the bill, are the expenses involved both in the hearing and in any subsequent review by the Courts, which whatever its amount, can in no event be recovered; the interruption of Petitioner's business, delay in completion of ships entailing liability for demurrage; but transcending all of these in importance and in the disastrous consequences likely to ensue, was and is the threat to the peaceful relations existing between Petitioner and its employees, and the loss by Petitioner of the good will of its employees. As elsewhere stated, the charge of unfair labor practice on which the Board acted, was not instigated by any of Petitioner's employees; but was filed by a non-resident labor organization affiliated with the C. I. O.

No labor dispute of any kind existed at Petitioner's plant (Exhibit C. R. 61).

In the nearly half a century of its existence, Petitioner has been singularly free from labor troubles of any kind. This fact is recognized by the District Court in the instant case, the Court saying that it had been urged that complainant (Petitioner) would suffer irreparable damages,

> "particularly in respect of the heretofore uniformly friendly relations which it says have existed between it and its employees. I think that is a fact of which this Court might well take judicial notice, that during the many years which complainant has been in business, it has a record, so far at least as the public has known, remarkably clear of conflict between it and its employees." (R. 91).

Collective bargaining has long been practiced at Petitioner's plant through a voluntary organization of employees, which Petitioner does not dominate or control, and to the funds of which Petitioner does not contribute. Any interruption of this mutually satisfactory means of negotiating and bargaining, through the existing Plan of Employee Representation would seriously disturb the harmony and good will now prevailing at Petitioner's plant.

Petitioner has the right to the continued good will of its employees. This is expressly averred in the bill. (Art. 17, R. 12).

This right, which is admitted to be in jeopardy, is one which this Court has recognized as having an incalculably great pecuniary value. In the case of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, a labor case, which involved an injunction, it is stated:

> "In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of realtions."

This Court has also recognized the right of the citizen to carry on business unmolested by arbitrary

action. It has recognized that that right possesses pecuniary value.

In the case of *Dorchy* v. *Kansas,* 272 U. S. 306, Mr. Justice Brandeis said:

> "The right to carry on business — be it called liberty or property—has value. To interfere with this right without just cause is unlawful."

The amount of damages apprehended far exceeds the jurisdictional amount. In a suit for an injunction the value of the matter in dispute is that of the object of the bill, namely, the value to the plaintiff of the right for which he prays protection.

Bitterman v. *L. & N. R. Co.,* 207 U. S. 205.

In their brief (pages 2-3) filed in opposition to the granting of *certiorari* in this case, respondents refer to a supposed holding of the District Court that Petitioner had not made out a case of irreparable injury and suggest that its action was merely an exercise of its discretion to grant or refuse an injunction. Presumably the suggestion will be included in any brief respondent may file herein. An examination of the opinion of the District Court will show that this is not correct. It will show that the case was not decided on any such ground. The bill was dismissed because, and only because, the Court held that the Board had exclusive jurisdiction to determine questions of its own authority, and that Petitioner had "a plain, adequate and exclusive remedy under the terms of the Act itself"; and because that supposed remedy was *exclu-*

sive, the Court was *without jurisdiction* of the cause. (Opinion R. 89 and 93). Holding the view that Petitioner, whether subject to regulation by the Board or not, was obliged to follow the procedural provisions of the Act the Court, logically enough, held that any damages resulting from that procedure were in the nature of damages *absque injuria.* Accordingly it said:

> "Damages of that character, gentlemen, as I regard them, are more in the nature of damages for which there can be no recovery. I do not think, therefore, that the allegations of the bill and the affidavits with it establish a case of irreparable injury such as will justify the Court in issuing an injunction."

In support of this view, the Court quoted from *Beman* v. *Cochrell,* 88 Fed. (2) 59, as follows:

> "That the parties may be subjected to expense, annoyance and inconvenience is no adequate reason for invoking the aid of equity, as expense, annoyance and inconvenience are present in some degree in all litigation; they are but incidental burdens of civilized government."

and added:

> "It seems to me that that language applies to the case presented by the bill." (R. 91).

This view, we submit, is wholly erroneous. If, as this Court has held, the Act does not purport to reach such a business as is presented on this record, and would have been void for lack of constitutional power, if Con-

gress had so framed it to make it apply to such a business, then the procedural provisions of the Act have no application here, and the case is one of attempted exercise of arbitrary power on the part of a governmental agency. It is within the condemnation of Jones v. Securities and Exchange Commission, *supra*.

We may here repeat that there is no analogy between the ordinary litigation to which all citizens alike are subject and which may be said to be "but incidents of the burdens of civilized government"; and a public investigation by an agency of the Federal Government of matters lying outside the ambit of its constitutional powers. Such an investigation is not an "incident of the burden of civilized government", but an instance of the usurpation of power by the Board.

IV.

Petitioner Has No Adequate Remedy At Law.

The legal sufficiency of the procedure outlined in the National Labor Relations Act, *as applied to those whose activities place them within the scope of the Act,* is not questioned in this brief. This was definitely settled by the decisions of this Court in the Jones and Laughlin case.

But it is denied that that procedure can, despite a proper challenge in Court, be applied to those whose activities, like those of Petitioner, lie outside of the scope of the Act, and beyond the limits of the Board's jurisdiction, as defined by this Court.

The Court below, in common with some others, seemed to be impressed with the practical necessity of

allowing the Board to make inquiry and reach some conclusion with respect to its jurisdiction.

They overlooked the distinction, elsewhere alluded to in this brief, between an informal, preliminary inquiry which may be conducted without notice, and a formal public hearing after charges are preferred and notice is given. Both are provided for in the Act. Thus Section 5 of the Act provides:

> "The Board may, by one or more of its members or by such agent or agencies as it may designate, prosecute any *inquiry* necessary to its functions in any part of the United States." (Italics supplied).

And Section 10 (b) provides for a public hearing of charges of unfair labor practices affecting commerce, *after service of complaint and notice* upon the one to be investigated. The former is a preliminary inquiry; the latter, analogous to trial after indictment. If the Board were to avail itself of the power conferred by Section 5 of making preliminary inquiries, which may be made without notice, there would probably be fewer public proceedings started, and hence fewer complaints filed with the Courts with respect to the Board's jurisdiction. One of the charges made in the bill in the instant case is that the Board had made no preliminary inquiry or taken any evidence as a basis for the proposed public investigation. (Art. 11, R. 6).

The Act gives the Board ample power to make preliminary inquiry into all questions affecting its jurisdiction. It is possible of course that, even after making the preliminary inquiry, it may reach an erroneous conclusion as to its jurisdiction. But if, with

or without a preliminary inquiry, it starts a public investigation of a concern whose activities lie outside of the scope of the Act, and of which the Board has no jurisdiction in fact, its action may be challenged in the Courts. This we understand to be the meaning of the right of challenge expressly recognized by this Court.

The Act "purports to reach only what may be deemed to burden or obstruct", interstate or foreign commerce. The jurisdiction of the Board is "limited to those instances which fall within the commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action."

Of what avail would be a challenge before the Board itself in a proceeding which it has already determined to carry through? If the challenge can be made *only* before the Board, it is worthless. So to interpret the right of challenge recognized by this Court, is to declare that a procedure intended only for those whose activities directly and substantially affect commerce, may be applied *in invitum*, to a concern which is not in that class. Congress, we submit, has no power to subject such a concern to that procedure. It has not attempted to do so by the Act in question.

It is very respectfully submitted that the Courts should not do, in this respect, what Congress has not done.

It is further submitted, and with great respect, that this particular procedure ought not to be extended beyond the class for which it was intended.

Under that procedure the party proceeded against is under a distinct disadvantage. On petition to enforce or review the Board's order, he goes to the reviewing Court *foreclosed* as to the *facts* and *foreclosed* as to the *law* relating to the legality and admissibility of the evidence by which those facts are supported. The Act expressly provides (Sec. 10(b)):

> "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

and by Section 10 (e):

> "The findings of the Board as to facts, if supported by evidence, shall be conclusive."

If one of these provisions is valid, the other is also. If one of them is binding upon the Circuit Court of Appeals on the review provided by the Act, the other is also. The result is that the reviewing Court is deprived of any standard by which to determine whether the evidence admitted by the Trial Examiner is or is not proper legal evidence. "The rules of evidence prevailing in courts of law or equity shall not be controlling." It is common knowledge that attorneys for the Board construe this to mean that "hearsay" is legal evidence; and that in actual practice, the trial examiners admit not only "hearsay", but other matter which, by the rules of evidence prevailing in courts of law and equity, should be excluded.

The findings of the Board as to facts, if supported by evidence, although not such evidence as would be recognized as legal and admissible in a court of law or equity—are conclusive; and it is not perceived what

a reviewing court can do about it. The Act has deprived it of all standards for judging of the legality of the evidence.

Where constitutional rights are involved, the citizen is entitled to the independent judgment of the Courts of the United States on all questions both of law and of fact.

Crowell v. *Benson,* 285 U. S. 22.

The extension of the procedural provisions of the Act to Petitioner, which is beyond the scope of the Act, involves an infringement of constitutional rights.

It is respectfully submitted that the procedure outlined in the Act cannot constitutionally be applied to the Petitioner whose activities admittedly do not directly and substantially affect interstate or foreign commerce. As to Petitioner, that procedure is no remedy. It is the evil to be avoided.

Petitioner in this case has challenged the action of the Board, as this Court has said it had the right to do. It has challenged that action in the only way that a challenge could possibly be effective, namely by applying to a Court of Equity for injunctive relief. Petitioner has no adequate remedy at law, and the injunction should have been granted.

The legal remedy which will prevent equity from taking jurisdiction must be as complete and practical, as prompt and efficient as the remedy sought in equity. It must be a present remedy.

Thus in *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, this Court said:

> "This Court has repeatedly declared in affirmance of the generally accepted proposition

that the remedy at law to exclude a concurrent remedy in equity, must be as *complete* as *practical,* and as efficient to the ends of justice and its *prompt* administration as the remedy in equity." (Italics ours.)

Citing, *Boyce's Ex'ors* v. *Grundy,* 3 Pet. 210
Phoenix Mutual Ins. Co. v. *Bailey,* 13 Wall 616
Kilbourne v. *Sunderland,* 130 U. S. 505
Tyler v. *Savage,* 143 U. S. 79.

V.

The Cases Relied on By Respondents, Some of Which Are Cited in Support of the Opinion of the Circuit Court of Appeals, Are Not Controlling.

It will doubtless have been observed that, in support of the position it has taken in this brief, Petitioner has cited only the decisions of this Court; and that it relies particularly upon distinctions made in the Jones and Laughlin groups of cases, in which the scope of the National Labor Relations Act is clearly defined, and, in conformity with the Act as thus interpreted, definite limits are set to the jurisdiction of the Board. Petitioner also relies on the cases cited, page 41, *post.*

On the other hand, the cases relied on by respondents and those cited in support of the *per curiam* opinion of the Circuit Court of Appeals, are decisions, not of this Court, but of other Circuit Courts of Appeals.

True, in some of them, this Court refused writs of *certiorari*. But this is not equivalent to an affirmance. This Court has repeatedly admonished the Bar to remember that its refusal of *certiorari* in a given case is not to be understood as an approval by the Court of the decision below.

A separate analysis of each of the cases cited in support of respondent's contentions is deemed unnecessary. A large proportion of them were brought before the decision of this Court in the Jones and Laughlin and allied cases, and attacked the constitutionality of the Act. In many of them the party seeking injunctive relief was engaged in interstate commerce, and relied solely upon the alleged invalidity of the Act.

Some of these opinions reveal a misapprehension of what was decided by this Court in the Jones and Laughlin case. This is illustrated by the case of *Pratt* v. *Oberman & Company* (C.C.A. 8), 89 Fed. (2) 786, cited in the opinion below. That case was argued on appeal, before this Court had decided the Jones and Laughlin and allied cases. It was decided May 5, 1937, after the decision of this Court in those cases. The Appellate Court referred to those decisions and said:

> "The principles announced in those cases are applicable to this case and are controlling.
>
> "We do not examine the issue here as to the existence of equitable jurisdiction. Even if such jurisdiction existed at the time the injunctional order was entered, the decree must obviously be reversed upon the issue of the validity of the act, since the appellee, whether subject to the act or not, is required to avail itself of the remedies therein provided, the ade-

quacy of which remedies can no longer be questioned."

It is submitted that the Court failed to observe what this Court had said as to the scope of the Act and the limit of the Board's jurisdiction. It failed to apply the well known rule that the language of an opinion is to be restrained to the facts and circumstances before the Court when the opinion was rendered. Through this failure the Court was led into the error of supposing that when this Court approved the procedural provisions of the Act as applied to those concerns which were held to be within its scope, it meant to approve also the application of that procedure to others,

"whether subject to the Act or not."

This we think was clearly a misapprehension of the intent and effect of the decisions in the Jones and Laughlin group of cases.

Pratt v. Oberman & Company, *supra,* and Beman & Cockrell et al, *supra,* are, it is believed, the only cases cited by respondents below which apparently hold that any concern proceeded against, although not subject to the act, is obliged to exhaust the administrative remedies therein provided; which, of course, means that such concern must submit to public investigation by the Board, although not subject to its jurisdiction.

In none of the cases relied on by the respondents, so far as we have been able to discern, did the Court consider the question whether a procedure intended only for those who are within the scope of the Act, and who are subject to regulation by Congress, can, with-

out violation of constitutional rights, be applied to those who are not within the scope of the Act, and not subject to regulation by Congress.

It is respectfully submitted that *insofar* as any of those decisions can be interpreted to hold that the procedral provisions of the Act may, despite a timely challenge of the Board's jurisdiction by resort to the Court, be applied to those who are not within the scope of the Act, and not subject to the legislative control of Congress, such decisions are unsound; and not in harmony with the decisions of this Court.

In the petition for a writ of *certiorari* in this case, Petitioner referred to the case of *Myers, etc.* v. *Bethlehem Shipbuilding Corporation* (C. C. A. 1), 88 Fed. (2) 154, rehearing denied, 89 Fed. (2) 1000. *Certiorari* was granted by this Court, October Term 1937, Nos. 181 and 182. It appears that the facts in that case are substantially similar to those in the instant case, though that case was not, as was this, disposed of on a motion to dismiss the bill. It is submitted that the opinions of the Circuit Court of Appeals in that case are sound.

Finally, the Jones and Laughlin case was widely different in its facts from the case at bar. This Court has found that that company, organized on a National scale, was engaged in far flung activities involving not only production but transportation in interstate commerce.

On the other hand, respondents, by their motion to dismiss the bill, have admitted of record that Petitioner's business is local. Its employees are engaged in production; none of them in transportation. This

Court in an unbroken line of decisions has recognized the soundness of the proposition that production or manufacture, in itself, is not commerce.

Kidd v. *Pearson,* 128 U. S. 1, 20, 21;
United Mine Workers v. *Coronado Coal Co.,* 259 U. S. 344, 407, 408;
Oliver Iron Min. Co. v. *Lord,* 262 U. S. 172;
United Leather Workers International Union v. *Herkert & M. Trunk Co.,* 265 U. S. 457, 465;
Industrial Asso. v. *United States,* 268 U. S. 64, 82;
Coronado Coal Co. v. *United Mine Workers,* 268 U. S. 295, 310;
A. L. A. Schechter Poultry Corp. v. *United States,* 295 U. S. p. 547;
Carter v. *Carter Coal Co.,* 298 U. S. 238, 304, 317, 327.

These cases are cited in the majority opinion in the Jones and Laughlin case, and we understand that their soundness was not questioned. They were distinguished from the case with which the Court was then dealing.

We respectfully submit that Petitioner's business as disclosed on the record, is within the principle of these cases, and is not subject to Federal regulation.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals was and is erroneous in the particulars set out in the foregoing pages of this brief;

and that the same should be reversed, and the cause remanded to that Court with instructions to direct the District Court to grant an injunction *pendente lite;* and proceed to hear the cause on the merits.

Very respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 305.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner,*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region
National Labor Relations Board, and as the National Labor Relations Board.

JACOB BLUM,
individually and as Regional Attorney for the 5th Region
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

We respectfully invite attention to the following reply to the Respondents' brief:

This Case Disposed Of On Motion To Dismiss. Lack of Jurisdiction In National Labor Relations Board Admitted By Respondents.

In none of the cases cited by Respondents on the question of enjoining action by an administrative agency, did the agency in question move to dismiss a complaint alleging facts showing want of jurisdiction, and thereby admit, as Respondents admitted in the instant case, that the agency was without jurisdiction.

At page 13 of Respondents' brief they say that in a number of cases in which this Court has refused to interfere with administrative action, it was contended, as in this case, that the administrative body was acting outside its jurisdiction. They cite four cases:

Dalton Adding Machine Co. v. *State Corporation Commission,* 236 U. S. 699

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Commission,* 279 U. S. 560

Lawrence v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588

Federal Trade Commission v. *Claire Furnace Co.,* 274 U. S. 160.

The first three were attempts to enjoin action by State Administrative agencies. The question of comity as between Federal and State governments was present as in *Prentis* v. *Atlantic Coast Line R. Co., et al,* 211 U. S. 210. In only one of the four were the rights or interests of the complainant in jeopardy; and in that case, notwithstanding a state agency

was involved, this Court continued a previously granted restraining order.

Thus, in *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission,* in which a three judge court had denied an application for an interlocutory injunction, this Court, while holding that permission to discontinue the train service in question should have been sought from the Commission, nevertheless vacated the decree denying the interlocutory injunction and continued in force a restraining order previously granted restraining the Commission from imposing penalties.

Dalton, etc., Co. v. *State Corporation Commission* concerned the assessment of a license tax, which was recoverable if paid under protest.

In *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* the decree awarding a temporary injunction was reversed, not because it was improper to enjoin action by an administrative body, but, in the language of Mr. Justice Brandeis:

> "because the verified bill and the affidavits fail to supply that evidence of danger of irreparable injury to plaintiff which is essential to justify issuance of a temporary injunction. Indeed, it appears affirmatively from the allegations of the bill and the facts testified to in the affidavits that irreparable injury would not have resulted from the failure to issue a restraining order, etc."

In the *Claire Furnace Case* the Federal Trade Commission was seeking to gather and compile information relating to certain corporations engaged in commerce. It had merely served notice pursuant

to Section 6 of the Trade Commisison Act, requiring the giving of information. No penalties could be enforced for failure to supply the information called for, nor any action taken to compel the furnishing of such information, until the propriety and legality of the requisition had been passed upon by the Attorney General. In the event he deemed action proper, he was required to institute a proceeding in the District Court. As Mr. Chief Justice Taft said:

> "Until the Attorney General acts, the defendants cannot suffer and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them."

The right to a judicial determination of all questions affecting the validity of the order was preserved by the act; and that determination was to be had in an independent proceeding in the District Court *before* any mischief had occurred or could occur.*

Here is no authority for the view that an administrative body, acting admittedly beyond its jurisdiction, may not be enjoined on a proper showing of irreparable injury.

There was, in that case, no admission, as in this, that the administrative body was without jurisdiction.

---

*Respondents' statement at page 4 of their brief that "The company filed no answer to the Board's complaint" is not correct. After serving on Respondents copies of its bill in this case with notice of the intention to file the same on a date stated, and before the hearing by the Trial Examiner, Petitioner appeared specially in the proceeding instituted by the Board, and, pursuant to such special appearance, filed an answer in which Petitioner expressly denied the jurisdiction of the Board and reserved all of its constitutional rights, and declined to submit the question of jurisdiction or any other of its constitutional rights to the determination of said Board.

When Respondents moved to dismiss the bill in this case they admitted all of the pertinent facts alleged therein.

Street v. *Lincoln Safe Deposit Co.*, 254 U. S. 88.

They thereby admitted that the National Labor Relations Board has no jurisdiction of Petitioner or its business. There was, then, *quoad* this case, no question of the Board's jurisdiction left for it to decide.

This would have been true even if the bill had confined itself to a description of Petitioner's business and omitted altogether the averments of Art. 24 (R. 17). Of the latter Respondents in a footnote at page 11 of their brief say:

> "Petitioner assumes that the allegations in its bill that its relations with its employees do not directly affect interstate commerce (R. 17) are admitted by the motion to dismiss. These statements are clearly conclusions of law, and accordingly not admitted."

They cite:

> *Pennie* v. *Reis*, 132 U. S. 464, 469-470
> *Pierce Oil Corp.*, v. *Hope*, 248 U. S. 498-500.
> *Nortz* v. *U. S.*, 294 U. S. 317, 324-325

The cases cited involve conclusions of law pure and simple.

The holdings were:

> *Pennie* v. *Reis:*
> "If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party in demurring to such

pleading does not admit the correctness of the construction, or that the statute imposes the obligation or confers the rights which the party alleges."

Pierce Oil Corp. v. *Hope:*

Demurrer to bill to enjoin enforcement of municipal ordinance does not admit an allegation that such ordinance is *unnecessary* and *unreasonable.*

Nortz v. *U. S.:*

"Defendant's demurrer, which admitted facts well pleaded in the petition, did not admit the allegations which amounted to conclusions of law in relation to the gold certificates or the legal effect of the legislation under which they were issued, held or to be redeemed."

These cases have no application here.

The allegations of Art. 24 (R. 17) to the effect that Petitioner's activities and its relations with its employees do not directly affect interstate or foreign commerce nor burden or obstruct the same or the free flow thereof, and have not led or tended to lead to labor disputes burdening or obstructing such commerce; are all allegations of fact, fully susceptible of proof, and would have been proved but for the interposition of the motion to dismiss.

That the relations between Petitioner and its employees have not led or tended to lead to labor disputes, is a fact so notorious that the District Court said it might well take judicial notice of it. (R. 91).

That these relations are and have continuously been harmonious is alleged not only here, but else-

where in the bill (Art. 15, R. 11 and 12; Art. 17, R. 12, and Exhibit C. R. 61). If there are and have been no labor disputes of any kind at Petitioner's plant, as Respondents admit by their motion to dismiss, there certainly have been none affecting commerce. Moreover, the bill describes in detail the Petitioner's activities, and shows that they are purely local, and have no direct and substantial effect upon commerce. This is admitted by the motion to dismiss.*

The Act Does Not Purport to Deprive Federal Courts of Equity of Their Power to Pass Upon Questions of Constitutional Right and Prevent Irreparable Injury.

Respondents argue that the National Labor Relations Act bars relief in equity by vesting exclusive jurisdiction in the Board and the Circuit Court of Appeals. This claim of exclusive jurisdiction rests upon an obvious distortion of the statute. The Board is by Section 10 (a) given power "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce; and this power is made exclusive. The only exclusive power

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*The foot note on page ten of Respondent's brief states that Petitioner has not assigned as error the failure of the Circuit Court of Appeals to grant an injunction **pendente lite**; and that therefore the sole question before this Court is "whether the District Court erred in dismissing the bill." They profess to think the request in Petitioner's brief that the District Court be directed to grant an injunction **pendente lite** is not permissible on the errors assigned. In this they are hypertechnical. The dismissal of the bill was all-embracing. Moreover, they are mistaken in their premises. Of the "specification of errors to be urged" contained in Petitioner's brief, the seventh (p. 10) is that the Circuit Court of Appeals erred "in affirming the Decree of the District Court". The decree of the District Court, both denied the motion for an injunction **pendente lite**, and dismissed the bill. (R. 96).

given to the Board is the power to prevent unfair labor practice *affecting commerce.* The exclusive jurisdiction conferred upon the Circuit Court of Appeals is confined to a review of the Board's action within the confines of its statutory authority.

The Act does not purport to deprive the District Courts of their ordinary equity powers in cases where proposed action by the Board threatens the invasion of constitutional rights. If it did, it would violate the Fifth Amendment as a taking of property without due process of law.

Respondents' argument proves too much. It claims for the Board the power to subject all business* to more or less protracted hearings on charges of unfair labor practices. Counsel say:

> "If the Board should find on the record made in the hearing before it that an employer was not subject to its jurisdiction because not engaged in commerce * * * the pending complaint would be dismissed and the employer relieved from *further proceedings.*" (Italics supplied)

The record before the Board is the record made before the Trial Examiner. (Section 16 Rules and Regulations, R. 36). Hearings before the Trial Examiner may last for weeks and even months. A prompt dismissal for want of jurisdiction is not feasible, and does not occur in practice. Respondents' argument therefore comes to this: Every employer in the United

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*Under Section 2, sub. 2, the United States, States and political subdivision thereof and persons subject to the Railway Labor Act, and labor organizations are excluded.

States may, on complaint filed with a Regional Director, and without any preliminary investigation as to the character of his business*, be haled before a Trial Examiner on charges of unfair labor practice, with no possibility of a judicial determination of the Board's jurisdiction, until after protracted hearing involving expenses that can in no event be recovered. Counsel say resort to Courts of Equity for a determination of this fundamental question would be "productive of intolerable delay."

We are not disposed to weigh the inconvenience that may result to the Board from a slowing down of its tempo, against the baleful consequences of a general paralysis of business. For precisely this may be expected, if the business concerns operating within the vast domain over which Congress has no constitutional control, can claim no immunity from the procedure prescribed by this Act; if, when proceeded against by the Board, they must submit to a long and highly expensive investigation, with no opportunity to obtain a judicial determination of their constitutional rights until after the mischief has been, in large

---

*Here the practice is widely different from that of the Federal Trade Commission under Section 5 of the Trade Commission Act. Under that section there are two important pre-requisites to the filing of a complaint. (1) The Commission must have reason to believe that the person or corporation in question is using unfair methods of competition in commerce. (2) It must appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.

Here is no authority to a Regional Agent or Director to file complaints in his uncontrolled discretion, whenever a charge is presented to him. Nor can the Commission itself institute such proceeding, without preliminary inquiry sufficient to satisfy it as to the two prime requisites mentioned above.

The assertion of Counsel that the procedure under this Act is substantially identical with that under Section 5 of the Trade Commission Act is quite inaccurate.

part, consummated. This is the fundamental question involved in this case. We are here dealing with constitutional rights. This Court, though generally reluctant to interfere with the proceedings of administrative bodies, has, nevertheless, recognized that where rights are likely to be violated or damages suffered in the meantime, even State Agencies may and should be restrained.

St. Louis-San Francisco Ry. Co. v. *Alabama Pub. Service Com., supra.*

It has also recognized the vital distinction between mere questions of the manner in which such administrative agencies perform their duty *within* their legitimate spheres, and questions going to their *jurisdiction* to act at all in the matter involved.

Thus in *Crowell* v. *Benson,* 285 U. S. 22, cited in our main brief, it was said in the majority opinion (at pp. 54-55):

> "What has been said thus far relates to the determination of claims of employees within the purview of the act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."

Again at pages 56-57:

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions" * * *
>
> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of facts by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

And at page 65:

> "It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere."

And in *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, this Court said at page 52:

> "Under our system there is no warrant for the view that the judicial power of a com-

petent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The Respondents here claim for the Labor Board the right and power to act "beyond the limits of Constitutional authority." To accomplish this they would "circumscribe" the judicial power of a competent Court. In their broad claim of the right to subject all business, regardless of its nature, to the burdens of defending charges of unfair labor practice, they presume upon the reluctance of Courts to interfere with the action of administrative bodies. *But that doctrine is applied only where it is apparent that no harm can be suffered if the administrative agency is permitted to proceed within the limits of its lawful authority.* And always the doctrine yields to the requirements of justice. If it be shown that penalties will be incurred, or other damages suffered before the constitutional rights of a party can be judicially determined, the administrative body, even though a state agency, will be restrained.

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Commission, supra.*

That petitioner will suffer substantial and irreparable injury, before any judicial determination of the jurisdictional question can be had, if the statutory procedure is followed, is clear from the record:

> "Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done."

Hitchman Coal & Coke Co. v. *Mitchell,* 245 U. S., at p. 256.

It is also clear that that procedure was not intended to apply, and cannot, without violation of the constitution, be applied to any employer whose activities do not burden or obstruct commerce. The bold avowal of representatives of the Labor Board of its purpose to apply it universally, demonstrates the need of leaving Courts of Equity free to exercise their normal functions, and to grant injunctive relief where, as in this case, it is admitted that the Board is without authority to deal with the relations between the complainant and his employees, and is merely exercising its *assumed* right to subject all business to the burden of defending unauthorized proceedings.

Such an injunction is the most effective, if not the only, means of confining the Board within its lawful bounds—certainly the only means of preventing serious injury and large irrecoverable expense before a judicial determination of the question of jurisdiction can be had, if the accused must follow the statutory procedure.

As was said in *Crowell & Benson, supra*, to confine the Board to its proper sphere "cannot be regarded as an impairment" of its intended efficiency.

Very respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 305

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

BENNET F. SCHAUFFLER, INDIVIDUALLY AND AS REGIONAL DIRECTOR FOR THE FIFTH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE OFFICERS OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case involves an attempt to enjoin a hearing by the National Labor Relations Board.[1] It is similar to the numerous cases which this Court declined to review in the October 1936 term, and presents no issue not presented in those cases. *Bradley Lumber Co.* v. *National Labor Relations*

[1] The petition for certiorari contains a prayer for the granting of a temporary injunction by one of the justices of this Court (Pet. 9). An application for a temporary injunction was made by petitioner to Mr. Justice Butler and was denied on August 12, 1937.

Board, No. 153, certiorari denied October 12, 1936; *Heller Bros. Co.* v. *Lind,* and six other cases, Nos. 704–710, certiorari denied March 15, 1937; *Hatfield Wire & Cable Co.* v. *Herrick,* No. 744, certiorari denied March 15, 1937; *Marathon Electric Manufacturing Co.* v. *Clark,* No. 752, certiorari denied April 5, 1937; *El Paso Electric Co.* v. *Elliott,* No. 1017, certiorari denied June 1, 1937.

The petition calls attention to the conflict between the decision below and the decision of the Circuit Court of Appeals for the First Circuit in *A. Howard Myers* v. *Bethlehem Shipbuilding Corp.,* 88 F. (2d) 154, rehearing denied 89 F. (2d) 1000, petition for certiorari pending, Nos. 181, 182. It should be pointed out that at the time when a review was sought in the first case of this character (*Bradley Lumber Co.* v. *National Labor Relations Board,* No. 153, *supra*) a conflict existed between that decision and a decision of the Circuit Court of Appeals for the Eighth Circuit. This conflict was called to the attention of the Court (see supplemental memorandum for the National Labor Relations Board in No. 153, October Term, 1936), and the Court nevertheless denied certiorari. Moreover, if the decision of the First Circuit in the *Myers* case should be affirmed by this Court, the result would be a holding that the granting of an injunction against a hearing by the Labor Relations Board is a matter of discretion with the district court. In the case at bar the discretion of the

district court has already been resolved against petitioner, since the district court specifically held that the allegations of the bill and the affidavits did not establish a case of irreparable injury such as would justify the issuing of an injunction (R. 71).

No questions worthy of review are presented herein. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 305

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

BENNETT F. SCHAUFFLER, INDIVIDUALLY AND AS REGIONAL DIRECTOR FOR THE 5TH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia (R. 88) is unreported. The opinion, *per curiam,* of the Circuit Court of Appeals for the Fourth Circuit (R. 104) is reported in 91 F. (2d) 730.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on August 2, 1937 (R. 105). The petition

for certiorari was filed herein August 11, 1937, and was granted October 11, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of the exclusive procedure and remedies provided in the National Labor Relations Act, the District Court properly granted respondents' motion to dismiss petitioner's bill in equity for an injunction against the conduct of a hearing and other proceedings which have been or might be taken by the National Labor Relations Board pursuant to that Act.

STATUTE AND REGULATIONS INVOLVED

The text of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*), and the applicable rules and regulations made and published by the Board pursuant thereto appear in the record (pamphlet R. 27–59).

The provisions of the Act are summarized in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 22–24, and in the brief for petitioners in Nos. 181 and 182,[1] pages 3–5.

[1] Nos. 181 and 182 are entitled, respectively, *A. Howard Myers et al.* v. *Bethlehem Shipbuilding Corporation, Ltd.*, and *A. Howard Myers et al.* v. *Charles Mackenzie et al.*

STATEMENT

The respondents Bennett F. Schauffler and Jacob Blum are respectively acting Regional Director and Regional Attorney of the National Labor Relations Board for the Fifth Region, which includes the State of Virginia. A trial examiner to be designated by the Board to hold the hearing sought to be enjoined, but whose name was unknown to petitioner, was also made a defendant in the bill of complaint (R. 5).[2]

On June 18, 1937, upon a charge by the Industrial Union of Marine and Shipbuilding Workers of America (R. 25), the National Labor Relations Board, through its Regional Director for the Fifth Region, respondent Bennett F. Schauffler, filed a complaint against the petitioner, Newport News Shipbuilding and Dry Dock Company, and gave notice of a hearing pursuant to Section 10 (b) of the Act (R. 21–25). The Board's complaint alleged that the company while engaged in the construction, overhaul, and repair of ships at its plant in Newport News, Virginia, had discharged and had refused to reinstate seven of its employees because of their union activity, had dominated and interfered with the formation and administration of a labor organization, known as "Representation of Em-

[2] The duties of these officials are set out in rules of the Board quoted in Footnote 2 (pages 5–7) of the brief for petitioners in Nos. 181 and 182.

ployees," had contributed financial and other support to said organization, and had thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the National Labor Relations Act (R. 22–25).

The company filed no answer to the Board's complaint, but instead filed in the District Court of the United States for the Eastern District of Virginia its bill of complaint in the present case against the respondents Schauffler, Blum, and a trial examiner to be designated by the Board, each individually and in his official capacity with the Board, "and as the National Labor Relations Board" (R. 1, 64). The bill prayed for temporary and permanent injunctions against the holding of the scheduled Board hearing and the taking of further proceedings under the Act, and also for a declaratory judgment that the Act as applied to petitioner's business and to petitioner's relations with its employees was unconstitutional (R. 19–21).[3] The bill described the manner in which petitioner's business was conducted (R. 4–6, 63), and alleged that neither petitioner's business nor its re-

[3] Neither the assignment of errors (R. 97) nor the petition for certiorari sought a review of the denial by the District Court of petitioner's application for a declaratory judgment. Accordingly, that aspect of the case is not before this Court. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 494; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *Prudence Co.* v. *Fidelity & Deposit Co.*, 297 U. S. 198, 208.

lations with its employees affected interstate or foreign commerce (R. 7, 17). The bill further alleged that petitioner had not engaged in any unfair labor practices (R. 7–8).

As grounds for invoking equity jurisdiction, the bill alleged that petitioner was without an adequate remedy at law (R. 15, 18) and would be irreparably damaged by the holding of the hearing by the Board and the taking of any action in connection therewith (R. 12). The bill alleged as elements of irreparable injury that petitioner would be held up to scorn as a violator of a law of the United States and so would incur for as long as the proceedings lasted the odium and ill will of the public and of its own employees (R. 9); that company officials and employees would be required to attend the hearing as witnesses and to produce evidence of a confidential nature, thus causing interruption and damage to petitioner's business, and putting petitioner to expense, including fees for counsel, none of which expense would be recoverable (R. 9–10); that the result of holding a hearing would be to delay the construction of certain naval vessels, and thus cause petitioner to be liable for demurrage charges (R. 14); that the threat of criminal penalty pursuant to Section 12 of the Act precluded petitioner from preventing the attendance of its officers and employees as witnesses at the hearing and would coerce petitioner into permitting the Board ille-

gally to invade petitioner's constitutional rights, including the right to have confidential information pertaining to the business preserved as confidential (R. 11); and that the pendency and holding of the Board proceedings, regardless of their outcome, would prevent the company from fully maintaining and enjoying the benefits of friendly and harmonious relations with its employees under the "Plan of Representation of Employees" existing in the plant, would impede petitioner in exercising its right to bargain freely and independently with its employees, impair the efficiency of its employees, and encourage demands by organized labor with the result that petitioner would suffer irreparable and heavy damage in the loss of prospective profits on its shipbuilding contracts (R. 12–15).

Petitioner moved for a temporary injunction (R. 64–65). Respondents submitted a verified statement in opposition to the motion for a temporary injunction (R. 74–86), and at the same time moved that the bill of complaint be dismissed.[4] It was averred in the motion to dismiss, *inter alia,* that petitioner had a plain, adequate, and complete remedy under the Act (R. 71) and had failed to resort to or exhaust its administrative remedies (R. 72);

[4] Respondents moved to quash the subpoena in so far as directed to them "as the National Labor Relations Board" (R. 67–69). The District Court did not find it necessary to pass upon this motion. A similar motion was granted by the District Court in Nos. 181 and 182.

that granting the relief prayed would be in usurpation of the authority exclusively vested in the Circuit Court of Appeals by the Act (R. 71); that petitioner was not threatened with irreparable or immediate injury cognizable in equity (R. 71, 73); and that the bill failed to show an "actual controversy" within the meaning of the Federal Declaratory Judgment Act (R. 71, 74).

The case was heard upon respondents' motion to dismiss. On July 14, 1937, the District Court entered a decree denying petitioner's motion for an injunction *pendente lite* and application for a declaratory judgment, and granting respondents' motion to dismiss (R. 96). Addressing himself solely to the question of jurisdiction in equity, District Judge Way, in an opinion from the bench, concluded (R. 93):

> I have very little hesitation in holding that the complainant has a plain, adequate and exclusive remedy under the terms of the Act itself, that no irreparable damage is threatened, and that this Court has no jurisdiction of the controversy presented by the bill.

On July 29, 1937, after allowance of an appeal (R. 98), petitioner filed in the Circuit Court of Appeals for the Fourth Circuit a motion for an injunction *pendente lite* restraining the respondents from holding the hearing or taking further proceedings pending the final determination of the cause (R. 101). The case was argued both on the motion and on the merits on August 2, 1937. On

the same day, the Circuit Court of Appeals filed a *per curiam* opinion concluding that the petitioner

> has an adequate remedy under the statute and may not apply for relief in equity until it has exhausted the administrative remedy there provided (R. 104),

and entered a decree denying the application for a restraining order pending appeal and affirming the decree of the District Court dismissing the complaint (R. 105–6).

The petition for certiorari was filed on August 11, 1937. On August 12, 1937, Mr. Justice Butler denied petitioner's motion for a temporary injunction against the holding of the hearing by the Board pending determination by this Court of petitioner's application for a writ of certiorari.

The hearing was held before a trial examiner of the Board from August 30 to September 8, 1937. The trial examiner has not as yet submitted his report to the Board, and the Board has not made any order in the case. The bill of complaint prays both that the holding of a hearing be enjoined and that the Board and its agents be restrained "from having any proceedings or taking any action whatever, at any time or times" for the purpose of determining whether or not the complainant has engaged or is engaging in any so-called unfair labor practices under the National Labor Relations Act (R. 20–21).

SUMMARY OF ARGUMENT

Since the issues in this case are the same as those presented in No. 181, we respectfully refer the Court to the Government's brief in that case for the statement of our argument. This brief is limited to a reply to several of the points raised by petitioner.

(1) The fact that the National Labor Relations Board may ultimately be found to have no jurisdiction over the petitioner does not mean that the Board may not hold a hearing to determine *inter alia* whether it has jurisdiction. Whatever be the extent of the power of the courts to determine *de novo* jurisdictional questions decided by administrative bodies, it has never been suggested that the administrative bodies could be enjoined from investigating such matters in the first instance. On the contrary, the doctrine that courts will not interfere with administrative action until administrative remedies have been exhausted requires that all such matters be first submitted to the proper administrative agency.

(2) The distinction suggested by the petitioner between the power of the Board to make an informal preliminary investigation and its power to hold a formal public hearing finds no support in the statute and is entirely without substance.

(3) The hearing sought to be enjoined has already been held. Accordingly, petitioner can now only complain of injuries which it alleges will be caused by the further proceedings in this case.

ARGUMENT

The issues in this case are the same as those presented in *A. Howard Myers* v. *Bethlehem Shipbuilding Corporation, Ltd.*, No. 181. The companies involved in both cases are shipbuilding corporations, and the allegations in the two bills of complaint with reference to irreparable injury are substantially identical. In each case complainants moved for a temporary injunction, and the representatives of the Board moved to dismiss the bill. In the instant case, No. 305, the District Court granted respondents' motion to dismiss the bill of complaint, and accordingly also denied petitioner's motion for a temporary injunction; in the *Myers* case the District Court denied the motion to dismiss and granted the temporary injunction. But inasmuch as the reasons advanced for reversing the decree in the *Myers* case necessarily lead to dismissal of the bill (petitioner's brief, No. 181, pp. 43–47), these differences in the manner in which the two cases were disposed of below are not material here.[5] Accordingly we respectfully refer

[5] Although the denial of petitioner's motion for a preliminary injunction was assigned as error in the Circuit Court of Appeals (R. 97), this point is not specifically raised either in "the Specification of Errors to be Urged" or the "Questions Presented" in petitioner's brief in this Court, or in the petition for certiorari and brief filed in support of the petition. The sole question properly before this Court is whether the District Court erred in dismissing the bill, and the argument in petitioner's brief is based on that theory. Nevertheless, petitioner now prays that this Court direct the district court to grant an injunction *pendente lite* (peti-

the Court to the brief for the petitioners in No. 181 (pp. 16–47) for the affirmative statement of the Government's position on the questions presented in this case.

This brief will be limited to a reply to several of the points raised in petitioner's brief.

(1) Petitioner's main argument is that if it is not subject to the regulatory powers of the Board,[6] it cannot be subject to the Board's investigatory powers, and that it is therefore entitled to a preliminary judicial determination of the question of the Board's jurisdiction. In support of this proposition petitioner relies on *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Jones* v. *Securi-*

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tioner's brief, p. 42). The opinion of the district court indicates that the denial of the injunction was regarded as necessarily following from the dismissal of the bill. But if the district court can be said to have exercised its discretion on the motion for temporary injunction, that discretion was exercised against the granting of the injunction.

[6] Petitioner assumes that the allegations in its bill that its relations with its employees do not directly affect interstate commerce (R. 17) are admitted by the motion to dismiss. These statements are clearly conclusions of law, and accordingly are not admitted. *Pennie* v. *Reis*, 132 U. S. 464, 469–470; *Pierce Oil Corporation* v. *Hope*, 248 U. S. 498, 500; *Nortz* v. *United States*, 294 U. S. 317, 324–325. The only facts admitted by the motion are those describing the manner in which petitioner's business is carried on, not the legal conclusion drawn from those facts. For reasons stated in our brief in the *Myers* case (pp. 18–20), the question as to whether the Act may validly be applied to petitioner is not now before this Court. Petitioner's business is carried on in substantially the same manner as that of the Bethlehem Shipbuilding Corporation (R. 22–24, 1, 4, 6, 63).

ties and Exchange Commission, 298 U. S. 1; and *Crowell* v. *Benson,* 285 U. S. 22.[7]

The *Ellis* and *Jones* cases held only that a court may refuse to compel a witness to appear or give testimony at an administrative hearing not authorized by statute. Even if it be assumed, *arguendo,* that petitioner could raise the question of the Board's jurisdiction in a proceeding brought by the Board to enforce a subpoena under Section 11 (2) of the Act,[8] it does not follow that petitioner can enjoin the holding of the hearing under Section 10. *Federal Trade Commission* v. *Claire Furnace Company,* 274 U. S. 160, makes it clear that injunctive relief against an investigation is not to

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[7] Petitioner also refers to a statement in the opinion of this Court in *Washington, Virginia and Maryland Coach Company* v. *National Labor Relations Board,* 301 U. S. 142, 146, that "the Act limits the jurisdiction of the Board to instances which fall within the commerce power and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action." This language obviously was intended to refer to orders of the Board reviewable under Section 10 (f) of the Act, and not to imply that the Board could be enjoined from holding hearings under Sections 10 (b) and (c).

[8] In the *Ellis* case, *supra,* the Interstate Commerce Commission was permitted to inquire as to the existence of facts which would bring the Armour Car Lines within its jurisdiction under Section 15 of the Interstate Commerce Act. This would seem closely to parallel the inquiry of the National Labor Relations Board as to whether petitioner is subject to the National Labor Relations Act. Compare *Natural Gas Pipe Line Co.* v. *Slattery,* No. 230, October Term, 1937, decided December 6, 1937, involving an enforceable order for the furnishing of data.

be granted when the complainant will have an opportunity to be heard in opposition to any compulsory process that may be issued.[9]

In a number of cases in which this Court has refused to interfere with administrative action, it was contended, just as here, that the administrative body was acting outside its jurisdiction. Thus, in *Dalton Adding Machine Company* v. *State Corporation Commission*, 236 U. S. 699, *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission*, 279 U. S. 560, and *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, the claim was that a state body was burdening interstate commerce, and thus exceeding its jurisdiction; in the *Claire Furnace* case, it was alleged that the Federal Trade Commission was attempting to investigate purely local transactions. In those cases the Court plainly recognized that the question of jurisdiction must first be decided by the administrative agency, and that until jurisdiction was taken and an order entered by the administrative body, there was no cause for judicial intervention. The Court refused to assume in advance that the administrative agency would unlawfully seek to extend its jurisdiction in violation of the

[9] It is to be noted that in the *Claire Furnace* case disregard of the Commission's order exposed the complainants to the possibility of incurring criminal penalties and liability to civil forfeiture in advance of any judicial determination as to the validity of the order. In the present case, where no such possibility exists, an injunction should *a fortiori* be denied.

Constitution. Compare *Dalton Adding Machine Co.* v. *State Corporation Commission of Virginia, supra,* p. 701; *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394, 398; *Continental Baking Company* v. *Woodring,* 286 U. S. 352, 369; *E. I. DuPont de Nemours & Co.* v. *Boland,* 85 F. (2d) 12, 15 (C. C. A. 2d).

Petitioner's argument in substance comes down to the proposition that whenever there is any doubt as to the jurisdiction of an administrative body over a particular person, the question may be determined in a court of equity in advance of any administrative proceeding.[10] Application of such a principle in other fields would completely revolutionize the system of administrative law in existence today. Many cases involving the jurisdiction of the Interstate Commerce Commission[11] would be submitted to courts of equity before the Commission had acted, as soon as a hearing was scheduled. On the same theory—that where courts were ultimately to decide questions they should do so prior to any administrative hearing—proceedings before the Federal Trade Commission could be enjoined until a court decided whether

[10] In every instance, a person could allege that attendance at the administrative hearing would upset the running of his business and cause him to incur irrecoverable expenses, thus resulting in the same kind of irreparable injury alleged here.

[11] E.g., *United States* v. *Idaho,* 298 U. S. 105; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe Ry. Co.,* 270 U. S. 266, 272; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469.

particular practices constituted unfair methods of competition in interstate commerce. Under this view, in the situation presented by *Crowell* v. *Benson, supra,* the jurisdictional question should have been determined by a court of equity in advance of the proceeding before a deputy commissioner.

Needless to say, no such doctrine is sanctioned by the decisions of this Court. Whatever be the extent of the power of the courts to determine *de novo* jurisdictional questions decided by administrative bodies (*Crowell* v. *Benson, supra; St. Joseph Stockyards* v. *United States,* 298 U. S. 38), it has never been suggested that the administrative bodies lack power to investigate such matters in the first instance. On the contrary, the doctrine that courts will not interfere with administrative action until administrative remedies have been exhausted requires that all such matters be first submitted to the proper administrative agency.

(2) Petitioner attempts to draw a distinction "between an informal preliminary inquiry which may be conducted without notice, and a formal public hearing after charges are preferred and notice is given" (petitioner's brief, p. 33). The suggestion apparently is that provisions in the Act for a preliminary inquiry furnish the Board with adequate means for determining whether an order should ultimately be issued against an employer, and that accordingly the public hearing may be enjoined unless it appears in advance that the

Board has correctly determined, in such an informal inquiry, that it has jurisdiction.[12]

The suggestion is a patent distortion of the scheme of the statute. Petitioner attempts to read into Section 5 of the Act a special provision for such "informal" investigations, distinct from the public hearings provided for in Section 10 (b).[13] The sentence quoted by petitioner from Section 5 declares that "The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States." This sentence plainly was intended to give the Board power to prosecute "any inquiry," formal or informal, (a) through designated agents and (b) in any part of the United States.

That the Board has power to make inquiries preliminary to the issuance of a complaint and notice of formal hearing there is no doubt. Evidently, however, neither Section 5 nor any other provision of the Act contemplates a preliminary inquiry prejudging the case in the fashion urged by the petitioner. If it did so, with the consequences sug-

[12] Thus, it is stated (p. 33) that the formal hearing required by the Act is "analogous to trial after indictment."

[13] Section 5 provides: "The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case."

gested by the petitioner, the Board would not only be subject to an injunction in any case in which its preliminary judgment was wrong, but it would be exposed to a suit for an injunction in any case in which its preliminary judgment was thought by the employer to be wrong. Such a scheme would be productive of intolerable delay, whereas the statute manifestly contemplates expedition. It would encourage the bias of deliberate *ex parte* judgment, whereas the statute requires the final determinations of the Board to be predicated upon an open hearing. It would deprive the Board, in the decision of some of the most difficult questions to come before it, of recourse to the sole available means of obtaining reliable and trustworthy information—the taking of sworn testimony from witnesses subject to cross-examination.

We submit that no tenable basis exists for an attempt to minimize (see brief for petitioner, pp. 32–33) "the practical necessity," which properly influenced the court below, "of allowing the Board to make inquiry and reach some conclusion with respect to its jurisdiction." On the contrary, the Act plainly vests this function exclusively with the Board in the first instance and inhibits time-consuming intervention by a court prior to formal determination by the Board that jurisdiction exists.

In most of the 95 equity suits brought against the Board and its officers [14] averments were made

[14] Compare the identical allegations in the case of the *Bethlehem Ship Building Corp.*, No. 181; and in *Heller*

by the employer that he was not engaged in interstate commerce, that he enjoyed harmonious relations with his employees, and that the holding of a hearing would disturb those relations and put him to inconvenience and expense. If such allegations are sufficient to permit the intervention of a court of equity, virtually all respondents in Board proceedings (except those already held subject to the Act by this Court) could delay the action of the Board until their status was first determined in equity cases instituted as soon as the Board ordered a hearing to be held. For the reasons elaborated in the brief for the Government in No. 181, to permit such a suit would not only be in violation of the intention of Congress in enacting the National Labor Relations Act but in contravention of the principle, established by numerous decisions of this Court, that administrative remedies must be first exhausted before resort to judicial proceedings.

(3) In view of the refusal of the Circuit Court of Appeals and of Mr. Justice Butler to grant injunctions staying the action of the Board pending appeal, the Board proceeded with the case in accordance with the statute. The hearing before the trial examiner was held from August 30 to September 8, 1937. The trial examiner has not as yet made his report to the Board, and the Board has made no decision.

Bros. Co. v. *Lind*, 86 F. (2d) 862, certiorari denied, 300 U. S. 672; and *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97, certiorari denied, 299 U. S. 559.

The holding of the hearing, accordingly, can no longer be enjoined, and petitioner cannot be protected from the injuries which it alleges will be caused by the hearing. To that extent the case is now moot. Petitioner can now only complain of injuries which it alleges will be caused by the further proceedings in the case—the report of the trial examiner, the possibility of an additional hearing, the argument before the Board, and the Board's findings and order. If the Board should make an order adverse to petitioner, the order would, of course, be enforceable only by the Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Fourth Circuit should be affirmed.

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DECEMBER 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 305.—October Term, 1937.

Newport News Shipbuilding and Dry Dock Company, Petitioner, *vs* Bennett F. Schauffler, Individually and as Regional Director for the 5th Region, National Labor Relations Board, et al.	On Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 31, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Newport News Shipbuilding and Dry Dock Company is a Virginia corporation engaged in the construction, overhaul and repair of ships at its plant in that State. In June, 1937, the Industrial Union of Marine and Shipbuilding Workers of America filed with the National Labor Relations Board the charge that the Company was "dominating and interfering with the employees' right of self organization by dominating, interfering with and lending financial support to a so-called labor organization" at said plant known as "Representation of Employees"; that the Company had discharged and refused to reinstate several employees at the plant "because they joined and assisted a labor organization of their own choosing and engaged in concerted activities with fellow employees for collective bargaining and other mutual aid and protection"; and that by so doing the Company was engaged in unfair labor practices within the meaning of Section 8, subsections (1), (2) and (3) of the National Labor Relations Act. Thereupon, the Board, through its Regional Director for the 5th Region, Bennett F. Schauffler, filed a complaint against the Company and gave notice of a hearing pursuant to Section 10 (b) of the Act.

The Company did not answer the complaint. Before the date assigned for the hearing, it brought, in the federal court for eastern Virginia, this suit, in which it sought to enjoin Schauffler, Jacob Blum, the Regional Attorney for the 5th Region, both citizens of

Maryland, and the Trial Examiner designated or to be designated, from holding the hearing and taking further proceedings under the Act. There were prayers for both an interlocutory and a final injunction and for a declaratory judgment that the Act as applied to the Company's business and its relations to its employees is unconstitutional. As the basis for this relief it alleged facts similar to those set forth in the bill of the Bethlehem Shipbuilding Corporation, Ltd., in No. 181, decided this day. It alleged, specifically, that neither the Company's business nor its relations with its employees affected interstate or foreign commerce; that it had not engaged in any unfair labor practice; and that it would be irreparably damaged by the holding of the hearing of the Board and the taking of any action in connection therewith. Among the elements of irreparable injury alleged were that the Company would be held up to scorn as a violator of a law of the United States and so would incur for as long as the proceedings lasted the odium and ill will of the public and of its own employees; that its officials would be compelled to produce evidence of a confidential nature; and that the pendency and holding of the Board's proceedings, regardless of their outcome, would impede the Company in exercising its right to bargain freely with its employees.

The case was heard by the District Court upon the plaintiff's application for a temporary injunction and the defendants' motion that the bill be dismissed on the ground, among others, that the Company had failed to exhaust its administrative remedies and that granting the relief prayed would be an usurpation of the authority exclusively vested by the Act in the Court of Appeals. The court denied the temporary injunction and dismissed the bill on the ground that the Company had "a plain, adequate and exclusive remedy under the terms of the Act itself, that no irreparable damage is threatened, and that this [the District] Court has no jurisdiction of the controversy presented by the bill." That decree was affirmed by the Court of Appeals for the Fourth Circuit, which held that the Company "has an adequate remedy under the statute and may not apply for relief in equity until it has exhausted the administrative remedy there provided." 91 F. (2d) 730.

We granted certiorari because of conflict with *Bethlehem Shipbuilding Corporation, Ltd.* v. *Myers, et al.*, 89 F. (2d) 1000, in which

the facts are substantially similiar and the issues the same. That case is reversed by our opinion delivered this day in No. 181. For the reasons there stated, we affirm the decree herein, adding only the following.

First. The Company insists that since the case was heard on motion to dismiss the bill which alleges that the Company is not engaged in interstate or foregin commerce and its relations to its employees do not affect such commerce, these allegations must be accepted as true. The motion admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts. The allegations that interstate or foreign commerce is not involved are conclusions of law.[1]

Second. The Company urges that, since the Board can have jurisdiction only over businesses engaged in interstate or foreign commerce, since the Company denies that it is so engaged, and the Federal Constitution does not permit vesting in an administrative body exclusive power to determine its own jurisdiction, the District Court must have power to pass upon that issue. The Act does not purport to leave the determination wholly to the Board. It confers upon the Board exclusive initial power to make the investigation, but provides for judicial review by the Circuit Court of Appeals.[2] As the only question here involved is the power of the Board to make the investigation, we have no occasion to consider the extent of the review provided.

It is suggested that while the Board has the right and duty to make, under Section 5 of the Act, a preliminary informal inquiry before public action, for the purpose of informing itself whether a particular concern is subject to its authority, the District Court may entertain a suit to prevent the Board from conducting a public investigation under Section 10 if the concern claims that it is not engaged in interstate or foreign commerce. The limitation suggested would, in large measure, defeat the purpose of the legislation. There is no basis in the Act for such a contention.

Third. The Circuit Court of Appeals having refused to grant an injunction staying the action by the Board pending the contem-

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[1] Compare Pennie *v.* Reis, 132 U. S. 464, 469-670; Pierce Oil Corporation *v.* Hope, 248 U. S. 498, 500; Nortz *v.* United States, 294 U. S. 317, 324-325; Pacific States Box & Basket Co. *v.* White, 296 U. S. 176, 184-85.

[2] Section 10 (a), (e), (f). See National Labor Relations Board *v.* Jones & Laughlin Steel Co., 301 U. S. 1, 47; Myers *v.* Bethlehem Shipbuilding Corp., Ltd., *supra*, p. —.

plated appeal, application for a stay was made to Mr. Justice Butler of this Court, after filing of the petition for a writ of certiorari. It has been called to our attention that, upon his denial of that application, the hearing was held before the trial examiner of the Board from August 30 to September 8, 1937, and has apparently been closed. To the extent that relief was sought to prevent the injury resulting from a hearing, the cause appears to be moot. But the cause cannot be disposed of as moot, as the trial examiner has not yet made his report to the Board; the Board has made no decision; and thus there is a possibility of further proceedings.

Decree Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.